UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

WENDT CORPORATION

Cases 03-CA-212225
03-CA-220998
and **03-CA-223594**

SHOPMEN'S LOCAL UNION NO. 576

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

JESSICA L. NOTO
JESSE FEUERSTEIN
Counsels for the General Counsel
National Labor Relations Board
Region Three
130 South Elmwood Avenue
Suite 630
Buffalo, New York 14202

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT

Despite attending 25 bargaining sessions, Respondent ridicules its bargaining obligation by readily making unilateral changes to employees' terms and conditions of employment. At the same time, Respondent denies employees their Section 7 rights by refusing an employee representation during an investigatory interview and discriminating against employees because they engaged in protected, union activities. Respondent continues its systematic campaign by threatening employees, interrogating them about their protected activities, and creating the impression their protected activities are under surveillance. This unlawful conduct has impeded good faith negotiations over the last year. Thus, Counsel for the General Counsel respectfully requests that Administrative Law Judge Ira Sandron (ALJ) find Respondent violated Section 8(a)(1), (3), and (5) of the Act and issue a decision and recommended order granting the relief sought herein, including extending the certification year.

II. STATEMENT OF THE CASE

This matter was heard by ALJ Ira Sandron on September 10-14 and November 5-7, 2018. An Order Consolidating Cases, Amended Consolidated Complaint, and Notice of Hearing issued on August 22, 2018, based on charges filed in Cases 03-CA-212225, 03-CA-220998, and 03-CA-223594 by Shopmen's Local Union No. 576 (Union). Wendt Corporation (Respondent) filed an answer to the Complaint on September 4, 2018. Respondent filed an amended Answer during the hearing. (Tr. 1684; GC Ex 1[a, c, e, j, l, n, p, s, u, y, aa]).[1]

The Complaint alleges Respondent, by plant manager Daniel Voigt, violated Section 8(a)(1) of the Act by: twice interrogating employees about their union support and activities;

[1] Throughout this brief the following references will be used: GC Ex. __ for General Counsel's exhibit (at page number); R. Ex. __ for Respondent's exhibit (at page number); Jt. Ex. __ for Joint exhibits (at page number); CP Ex. __ for Charging Party's exhibit (at page number); and Tr. __ for transcript page(s).

twice instructing employees to remove pro-union T-shirts; twice informing employees that pro-union employees were targeted for a future layoff; creating the impression of surveillance on three occasions; threatening employees with unspecified reprisals for their union support; implying that an employee would receive a wage increase for supporting the union; and twice telling employees how to maintain their private Facebook pages. The Complaint further alleges Respondent violated Section 8(a)(1) of the Act by:

- implying in a performance review that an employee should focus on work rather than union activity; and
- denying employee John Fricano's request for union representation during an investigatory interview.

The Complaint also alleges Respondent violated Section 8(a)(3) of the Act by:

- suspending employee Dennis Bush;
- failing to provide annual performance reviews and wage increases to its unit employees (also alleged as an 8(a)(5) violation);
- changing employee William Hudson's work assignment; and
- refusing to offer Hudson overtime.[2]

Finally, the Complaint alleges that Respondent violated Section 8(a)(5) of the Act by:

- failing to bargain with the Union prior to issuing discretionary disciplines to employees Dennis Bush and John Fricano;
- removing employees from the bargaining unit;
- transferring bargaining unit work to non-bargaining unit employees;
- requiring employees to work mandatory overtime;
- granting wage increases to certain unit employees;

[2] The General Counsel orally amended this allegation at the hearing to specifically allege that "in or about April 2018, Respondent refused to offer overtime to its employee William Hudson." (Tr. 1060).

- changing its light duty policy;
- laying off ten employees; and
- failing to provide the Union with requested information.

Respondent, in its amended Answer, admits the following:

- it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act;
- the Union is a labor organization as defined by Section 2(5) of the Act;
- Ken Scheidel, Richard Howe, Daniel Voigt, Michael Dates, Michael Hoerner, Janet Semsel, Joseph Bertozzi, and Thomas Wendt, Jr. are supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act;
- Denise Williams is an agent of Respondent within the meaning of Section 2(13) of the Act;[3]
- all full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen and shipping and receiving clerks employed at Respondent's facility constitute an appropriate bargaining unit within the meaning of Section 9(b) of the Act.[4] (GC Ex 1[g]).
- John Fricano was denied union representation;
- John Fricano and Dennis Bush were suspended; and
- Respondent changed William Hudson's work assignment.

Respondent denies that it violated Section 8(a)(1), (3), and (5) of the Act as alleged in the Complaint. (GC Ex. 1[g], [aa]).

[3] Respondent, in its Answer, denies knowledge or information sufficient to respond to the allegation that its unknown legal representative is an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Ex. 1[aa]). The record is replete with both testimony and documentary evidence that Ginger Schroeder acted as the Respondent's legal representative and lead spokesperson throughout contract negotiations with the Union, and as such, is an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 1685).

[4] Respondent, in its Answer, admits that the bargaining unit, as alleged, was certified by the Board on June 19, 2017. (GC Ex. 1[aa]).

III. FACTS

A. Respondent's factory

Respondent operates a 150,000 square foot factory located on Walden Avenue in Cheektowaga, New York (Cheektowaga Plant or Plant) where it designs, develops, manufactures and sells products for the scrap metal industry. (Tr. 1076, 1103; GC Ex. 1[y]; R. Ex. 8). Respondent also acts as a reseller for a variety of manufacturers, sells spare parts, and services certain products. (Tr. 1077-78; R. Ex. 8).

Respondent's factory consists of five bays where employees perform production work. (R. Ex. 10). Bay 1 contains a large warehouse for electronic fabrication (using three dimensional models rather than drawings), where fitters and welders work with raw metal. (Tr. 1113). Bay 2 contains a shipping/receiving dock and a manufacturing area where machine operators run a burn table[5] and press brake.[6] (Tr. 1104-05). A warehouse where shipping/receiving employees ship or store items occupies Bay 3. (Tr. 1104). Product assembly occurs in Bay 4. (Tr. 1109-10). Bay 4 also houses the machine shop. (Tr. 1111). In-house fabrication and welding occurs in Bay 5. (Tr. 1107). All parts are painted in a paint booth in the middle of the Plant. (1109-10). In addition to the Bays, the Plant also contains finished office space, where Respondent maintains several offices for non-production employees. (R. Ex. 10).[7]

All areas of the Plant work together to complete a project. Generally, raw material enters the Plant at either Bay 5 or Bay 1, is processed through all five bays, and then is stored in the warehouse for shipping. (Tr. 1114-15). To that end, employees necessarily move between Bays.

[5] A burn table is a high volume steel shape burning machine.
[6] A press brake cuts, shears, and bends metal.
[7] Respondent outsources traditional human resource functions to ESC, a third-party professional employer organization, and directly employs one on-site human resources employee (human resources coordinator Janet Semsel). (Tr. 1589-90).

Material handlers transport material throughout all areas of the Plant. (Tr. 1107). Employees also can see into other areas of the Plant through large openings between the Bays. For example, employees can see between Bay 2 and Bays 1 and 3. Similarly, there are sight lines between Bay 4 and Bays 2 and 5. (Tr. 1105, 1107, 1109).

B. Respondent's production employees elect the Union and the parties bargain

The Union started a campaign to organize Respondent's production and maintenance employees in or about March or April 2017. (Tr. 28). The initial and primary employee contact for the Union during the organizing drive was welder William Hudson. (Tr. 31, 173, 887). Hudson, nicknamed by his coworkers as "the President" due to his extensive pro-union activities, often wore pro-union paraphernalia and spoke with co-workers about union meetings and signing union cards. (Tr. 174, 528, 669). Hudson served as the Union's witness during the Board-run representation election, and later served on the Union's bargaining committee. (Tr. 174, 887, 890). Hudson was and remains open about his support for the Union – he visibly wears pro-union T-shirts and buttons on a daily basis, and answers union-related questions from his co-workers. (Tr. 888-89, 913).[8] Respondent does not dispute that Hudson is a vocal union supporter. (Tr. 1274). In response to the Union's campaign, Respondent held multiple employee meetings to discourage unionization. (Tr. 179-80). Respondent also bolded the names of Hudson and other "union initiators" on Respondent-maintained lists of employees required to attend each meeting. (Tr. 180-81).

[8] By certified letter dated January 24, 2018, the Union provided Respondent with a newsletter which included a picture of several of Respondent's unit employees wearing pro-union paraphernalia. (Tr. 1537, GC Ex. 3). Included in that picture were Hudson, Dennis Bush, and Dale Thompson. (Tr. 30; GC Ex. 3). Respondent acknowledges receipt of the letter. (Tr. 1593).

On June 19, 2017, following a Board-run election, the Union was certified as the exclusive collective-bargaining representative of the production and maintenance employees at the Cheektowaga Plant. (Tr. 26, 28; GC Ex. 2).[9] Respondent admits that following certification, and at all relevant times, many of its employees were open and obvious about their support for the Union. (Tr. 1601). Employees wore pro-union T-shirts to work and left pro-union paraphernalia around the Plant. (Tr. 1594, 1596-601; R. Ex. 23). Union supporters were even described as being "in [Respondent's] face" voicing their Union support. (Tr. 1594). Currently, there are approximately 35-40 members of the bargaining unit. (Tr. 26).

The parties formed their committees and first met to negotiate an initial collective-bargaining agreement in July 2017. The Union's bargaining committee includes employees Hudson, David Greiner,[10] and Robert Domaradzki. (Tr. 27-28, 782, 887-88, 956). Respondent's bargaining committee consists of attorney and lead spokesperson Ginger Schroeder, chief financial officer Joseph Bertozzi, operations director Richard Howe, and supply chain manager Michael Dates. (Tr. 27, 888, 956, 1074, 1434, 1590, 1685). Since bargaining began in 2017, the parties have met more than 25 times without reaching agreement. (Tr. 27, 888, 956, 1435). At no time during bargaining has either party declared an overall impasse. (Tr. 27, 888).

C. Respondent's plant manager Dan Voigt unlawfully threatens and interrogates employees

Respondent's plant manager, Daniel Voigt, made a litany of unlawful statements to multiple employees after certification. These include unlawful threats, interrogations, instructions, impressions of surveillance, and promises. Respondent presented no evidence to

[9] Via a memorandum of agreement dated September 22, 2017, the parties agreed to include leadmen in the bargaining unit. (Tr. 76, 128; GC Ex. 25).
[10] Greiner resigned his employment with Respondent in September 2018. (Tr. 955).

refute employee testimony, as described below, about any of the allegations regarding Voigt's unlawful statements.

1. Voigt makes unlawful statements to Dale Thompson (Complaint paragraphs 6(a), (g), (i), (l), (k))

Voigt made multiple unlawful statements to welder/fitter Dale Thompson. In September 2017, only three months after the Union's certification, Voigt approached Thompson near the end of the work day, engaged in some small talk, and then brazenly asked Thompson whether he would change his vote in the union election if there was a revote. (Tr. 346, 347). Thompson replied that he did not want to, and that if he changed his mind, Voigt would fire his friends and coworkers. (Tr. 346-47). Voigt replied "there's a lot of bad employees here, and I'd like to get rid of them in the shop, and also one in the office as well." (Tr. 347).

Voigt targeted Thompson about his private Facebook activity. Thompson had "liked" several pro-union posts and pages. (Tr. 348). In January 2018, he decided to block[11] Voigt (the two had been Facebook "friends" for a few months) because Voigt was causing issues with Thompson's co-workers about their pro-union Facebook postings. (Tr. 348, 376). The next morning at about 8:00 am, Voigt approached Thompson and told him that he did not care that Thompson blocked him on Facebook because he could make a fake Facebook profile and see anything Thompson did on Facebook. (Tr. 348). Voigt also said that there were two office employees that could see everything employees did on the internet. (Tr. 348).

Even Thompson's family was not immune from the latest litany of Voigt's threats. About a half hour later, Voigt again approached Thompson, said that he liked him, knew he had young kids, and did not want him to be laid off. (Tr. 350). Voigt informed him that employees that

[11] To "block" means that Voigt was no longer able to interact with or see anything that Thompson "liked" or posted on Facebook. (Tr. 349).

voted for the Union were the ones that would be laid off. (Tr. 350). Voigt then stated that Respondent utilizes cameras on the outside of the facility and that those cameras could zoom in and read the writing on shirts. (Tr. 351). He even said that "they could see the color of somebody's underwear if they bent over." (Tr. 351). This conversation stressed Thompson out so severely that he spent the day making mistakes and decided to call out of work the next day. (Tr. 353).

Despite Voigt's continued threats to Thompson about engaging in union activity, Thompson still attended a Union-held rally outside the Respondent's facility on the day of the layoffs in February 2018. (Tr. 353-54). After the rally, Thompson returned to work. Voigt approached and complained to Thompson that he was "really pissed" about rally-goers blocking his car. (Tr. 354, 377-78). Thompson replied that he did not agree with those actions, but that he also did not agree with the layoffs. (Tr. 354). Voigt replied that the employees getting laid off were the ones who would continue to be laid off. (Tr. 354-55).

2. Voigt makes several unlawful statements to Jeff George (Complaint paragraphs 6(b), (c), (d), (e), (f), (h), (j), and (k))

Thompson was not the only unit member that Voigt threatened. On January 10, 2018, painter and unit member Jeffrey George wore a Union T-shirt, with a visible Union logo to work. (Tr. 268-69). Voigt approached George in the paint booth at about 7:30 or 8:00 am. The two had the following conversation:

> Voigt: What are you doing?
> George: What do you mean?
> Voigt: With that shirt on?
> George: Oh, it's a work shirt, it was given to me and I'm wearing it.
> Voigt: Well, I would take that off if I were you. That's how guys get into trouble around here. (Tr. 270; GC Ex. 41).

Following that conversation, Voigt walked away. (Tr. 270)

The conversation made George "nervous." (Tr. 272). As a result, about an hour later George approached Voigt, and the following conversation ensued:

> George: You made me a little nervous regarding the last conversation. I got a wife and kids and I can't afford to lose my job over, you know, union stuff.
> Voigt: Don't worry, you're a hundred percent safe. There's a list of guys in the shop that the company can't afford to lose and you're on the top of the list.
> George: How am I safe when the company has to layoff by seniority?
> Voigt: (Respondent) will absolutely not layoff by seniority
> George: How's that?
> Voigt: We have our ways around it. If I had write-ups or points, I'd watch myself.
> George: Oh, well, is the Company at least busy?
> Voigt: Yes, we have plenty of work, don't worry, you know, we're busy.
> George: Oh, so it's only by design that we're slow?
> Voigt: We're just taking it in the ass until all this goes away.
> George: Well, what departments are going to get hit?
> Voigt: Between nine to ten welder/fitters, a burn table operator, a saw operator, and possibly one painter.
> George: Well, how are we going to go on, how are we going to pull this off with such a small staff?
> Voigt: (You) would have help – put the guys that (are) leftover in the shop and once the Company started to ramp up again (Respondent) would bring in all new people.

(Tr. 271-72; GC Ex. 41)

George also maintains a Facebook account which came under fire by Voigt. (Tr. 272). On January 22, 2018, George edited his Facebook profile picture to show a pro-union T-shirt with Respondent's name and logo, the words "Don't Shred Our Rights," and the hashtag "Fair Contract Now." (Tr. 277-78; GC Ex. 42). Two days later, Voigt approached George while he was in the welding shop at about 7:30 am. (Tr. 280-81), and the two had the following conversation:

Voigt: Some of the office personnel and I see that you have a new Facebook picture.
George: What are you guys doing, spying on me?
Voigt: I'd take that down if I was you. You'd probably get in less trouble wearing that stupid shirt then (sic) putting that on the internet. (Tr. 281; GC Ex. 41).

As a result of George's conversation with Voigt, George changed his Facebook profile from public to private. (Tr. 309).

Voigt also interrogated George about his conversation with other unit employees. On January 25, 2018, Voigt approached George in the morning while he was in the paint booth, and asked him about a union meeting the previous evening. (Tr. 284). George told him there had not been a union meeting, and Voigt replied "no, the negotiations meeting." (Tr. 284). The conversation continued:

George: Oh, I don't really know, you know, anything about negotiations. You know, nobody tells me any of that stuff since I'm not on the bargaining committee.
Voigt: Well, if you hear anything that you think I should know, you need to tell me, and I'll be a good friend and do the same for you.

(Tr. 284; GC Ex. 41).

3. Voigt threatens Dmytro Rulov (Complaint paragraphs 6(m) and 7)

Dmytri Rulov was the final employee threatened by Voigt. On the afternoon of April 10, 2018, Rulov attended his annual evaluation meeting with Voigt and employee Americo Garcia[12] wearing his pro-union button that reads "Fair Contract Now." (Tr. 401-06; GC Ex. 44). At the end of the meeting, when the Rulov was to sign the evaluation, Voigt pointed at Rulov's pro-union pin with a pen and said that Rulov should work more overtime, concentrate on his job, and

[12] Neither Voigt nor Garcia testified about this conversation. Thus, Rulov's recitation of events remains unrebutted.

forget about any outsource[13] activity. (Tr. 404, 407). This comment was also reflected in Rulov's evaluation which said that he needed to focus more on the job at hand and worry less about non-work related activities. (Tr. 405, 418; GC Ex. 43).

D. The Union requests to bargain all disciplines, and Respondent refuses to comply (Complaint paragraph 10(i))

By letter dated October 9, 2017, union representative Anthony Rosaci requested that Respondent bargain with the Union prior to the issuance of any discipline. (GC Ex. 15). In a written response, Respondent denied its bargaining obligation, and since that time, despite repeated union bargaining requests, Respondent has refused to comply. (Tr. 52; GC Ex. 7, 16, 17, 18).

E. Respondent's failure to afford *Weingarten* protections and bargain a discretionary discipline issued to unit member John Fricano (Complaint paragraphs 8 and 10(a), (g), (h), and (i))

On October 23, 2017, painter/finisher John Fricano engaged in conduct that resulted in discipline. That day, Fricano was assigned to paint a finder bed.[14] (Tr. 424-25). Fricano loaded the finder bed onto a forklift and drove the forklift into the paint booth. (Tr. 425). Voigt witnessed this, and went to ask Respondent's operations director Richard Howe to look at what Fricano was doing. (Tr. 1248). Howe walked to the paint booth, looked in, and saw the finder bed lifted up on the forklift. (Tr. 1249). Fricano saw Howe and Voigt at the entrance to the paint booth and explained what he was doing. (Tr. 425, 1249). Howe and Voigt told Fricano that it was a bad idea to paint the finder bed while it was still on the forklift. (Tr. 425-26, 1249).

[13] Rulov testified about possible language barriers to his testimony. This is one circumstance where the record and context makes clear that he meant "outside" activities.

[14] A finder bed is the midsection of a finder, which is a portion of a machine built by Respondent. (Tr. 425).

Fricano complied, pulling the forklift out of the paint booth, pulling the finder bed into the paint booth (without the forklift), and painting it. (Tr. 426).

After the incident, Voigt, Howe, and Bertozzi met to discuss possible punishment for Fricano. (Tr. 1249). They found it unusual that while Fricano had some write ups,[15] he did not have any prior safety violations. (Tr. 1250). Howe testified that, while Respondent had the right to terminate Fricano based on the seriousness of the action, Respondent "exercise[d] some discretion" and chose to suspend Fricano for three days instead. (Tr. 1250, 1252).

Before issuing the discipline, Respondent had an investigatory interview with Fricano about his conduct. On October 25, Voigt interrupted Fricano at work to come to his office and discuss the forklift incident that had occurred two days prior. (Tr. 426, 434-35). Fricano immediately requested union representation. (Tr. 426-27, 436). Voigt refused Fricano's request. He told Fricano "no, we're just going to go ask you a few questions about what happened."[16] (Tr. 428, 431, 436). Voigt then escorted Fricano to Voigt's office. (Tr. 429). Also present in Voigt's office were Denise Williams from Respondent's human resources office, working supervisor Don Fess, and human resources coordinator Janet Semsel. (Tr. 429, 437). Williams presented Fricano with a written discipline, told Fricano that he would be terminated the next time he was disciplined, and told him to sign it. (Tr. 429, 438-39; GC Ex. 19).

Fricano was handed a discipline with the "details" of the incident already completed. (Tr. 429). In that portion of the document, Respondent had typed the following:

[15] Fricano had a prior coaching notice dated September 12, 2017, and written warning, dated October 10, 2017, both resulting from alleged insubordination. (GC Ex. 19).

[16] There is no dispute that Fricano requested union representation or that Voigt denied that request, as Voigt did not testify at the hearing and Respondent's answer admits that Fricano was denied union representation by Voigt. (GC Ex. 1[aa]).

> On 10/23/17, John Fricano pulled a forklift into the paint booth and closed both overhead doors so he could proceed to paint the materials on the forklift. Rick Howe, Director of Operations, immediately stopped John due to the potential safety hazard of using flammable paint with the presence of anything that could cause a spark, which could result in igniting materials in the paint booth. If John proceeded to paint the materials on the forklift with both overhead doors shut as he intended, and if Rick hadn't stopped him, this may have resulted in severe injury to himself and others up to and including employee casualties. (GC Ex. 19).

The document also contained two boxes for Fricano to check, one stating "I agree with the above statements" and the other stating "I disagree with the above statements." (GC Ex. 19).

Fricano read the document. (Tr. 429). Williams told Fricano to sign the document several times, and Fricano repeatedly refused. (Tr. 430, 443). Finally, Williams told Fricano to at least check one of the two boxes – agree or disagree. (Tr. 430). Fricano said he disagreed, and that the description of events did not match what actually occurred. (Tr. 430). Williams instructed him to check that box and initial above the checkmark. (Tr. 430). Fricano did as instructed. (Tr. 430, 443; GC Ex. 19). Fricano tried to ask questions about the discipline, but "got nowhere" and gave up. (Tr. 440-41). At some point, Fricano requested Howe's presence in the room due to his role in the discipline. (Tr. 442-443). Howe joined the meeting and told Fricano there was nothing he could do about the discipline. (Tr. 443, 448)

Ultimately, Respondent suspended Fricano for three days. (Tr. 56, 430-31; GC Ex. 19). Bertozzi testified that Fricano was granted leniency because his actions were so "egregious" Respondent should have terminated him. (Tr. 1667). Respondent did not inform, or bargain with, the Union prior to the issuance of the discipline. (Tr. 57, 430-31, 797-98, 907, 968).[17]

[17] At some point after the issuance of the disciplines to Fricano and Bush (see below), the Union, during bargaining, requested and received an explanation of the disciplines from Respondent. (Tr. 1019-20, 1046).

Respondent's decision to issue Fricano a three day suspension for his first safety offense is contrary to its own policies and historical decision-making. Respondent maintains an Employment Manual ("Manual") which classifies "Non-compliance to Plant Safety" as a "General Offense" subject to a four-step progressive discipline policy which includes a verbal warning for a first offense, written warning for a second offense, written warning plus three day suspension for a third offense, and termination for a fourth offense. (GC Ex. 23, p. 50-1). The record also establishes that Respondent uses discretion when determining the level of discipline for safety violations. For instance, Respondent issued production employee Marko Percevic a written warning in 2011 (despite no record evidence of any other offenses) for tampering with machine settings and putting an employee's safety at risk. (GC Ex. 59). Respondent issued a written warning to production employee Chris Dunning in 2011 for creating an "extremely dangerous" safety hazard while welding. (GC Ex. 61). Respondent issued a three-day suspension to working supervisor Dan Norway (who had one prior discipline) for welding near flammable paint and creating a safety hazard. (GC Ex. 60).

F. Respondent suspends Dennis Bush in retaliation for his pro-union activity and fails to bargain with the Union over that discipline (Complaint paragraphs 10(b), (g), (h), (i) and 14)

Unit member Dennis Bush is a well-known Union supporter. (Tr. 855, 877). Specifically, Bush attends weekly lunchtime pro-union rallies[18] where he holds up pro-union signs in the presence of management. (Tr. 528, 845, 848). Bush frequently wears a pro-union shirt (with the union logo visible) and button,[19] adorns his welding helmets and car with pro-union stickers, and

[18] These weekly rallies started around the time of the election and have continued since that time. (Tr. 849).

[19] Bush started wearing pro-Union shirts approximately one month after the election, and started to wear pro-union buttons several months later. (Tr. 845-46, 876-77).

speaks favorably about the union with his co-workers.[20] (Tr. 528, 669, 845-46, 848-49). Bush also spoke with members of management about the Union both before and after the union election. Respondent admits that it was well aware of Bush's support for the Union. (Tr. 1238; GC Ex. 3).

Respondent punished Bush for engaging in his union activity under the following scenario. In or about late 2017, unit member Robert Domaradzki told co-workers that he was looking for a box to store wooden trimmings. (Tr. 804-05, 880). On or about December 21, 2017, near the end of a work day, Bush found a toolbox for Domaradzki, who he knew had been looking for such a box. (Tr. 857). Being helpful, Bush walked the box to Domaradzki's work area. (Tr. 857-58). On the way, he walked by Voigt's office, Voigt looked up and saw Bush awkwardly walking down the aisle balancing a crate on a large piece of machinery with one hand and a control box in the other.[21] (Tr. 859). Bush, acknowledging Voigt's confusion, held up the box and said that he found a box for Domaradzki. (Tr. 859). The box Bush held up was a brown wooden crate with the printed capital letters "F-A-G" on one side.[22]

This crate is one of many that Respondent receives from a bearing supplier in Germany. The boxes arrive into shipping/receiving with the initials "F-A-G" in large black capital letters on the side. (Tr. 968, 998, 1672). Respondent keeps these boxes, and employees routinely repurpose the boxes for use within the shop. (Tr. 1000). Shipping and receiving employees have

[20] In or about spring 2017, in the presence of Howe and unit member Robert Showler, supervisor Scheidel asked Bush why he was wearing union colors, because Scheidel believed Bush opposed the Union. Bush replied that he was representing his "fellow brothers." (Tr. 851-53).
[21] On this day, Bush was wearing a pro-union T-shirt with the words "Don't tread on my rights." (Tr. 861).
[22] This was the only available box in Bush's work area. (Tr. 881-82).

never been told to black out or otherwise conceal the letters on the boxes. (Tr. 1047). Bush found one of these boxes for Domaradzki.

Voigt, snickered upon seeing the letters, but did not stop Bush. (Tr. 859). Bush went to Domaradzki's area and told him "here is your box." (Tr. 803-04, 806, 824, 857, 860, 884; GC Ex. 22). Domaradzki saw the letters and laughed, and Bush laughed with him. (Tr. 826-27, 859). Bush then went right back to work. (Tr. 860). Voigt witnessed the exchange and said nothing to either participant. (Tr. 803-04, 820-21, 823, 859-60). Domaradzki did not complain to management about the exchange. (Tr. 827).

Bush worked the next day as usual. (Tr. 862). At the end of the work day, Bush met with human resources coordinator Semsel and human resources representative Denise Williams. (Tr. 862, 865-66). The two asked if Bush remembered the writing on the box he delivered to Domaradzki. (Tr. 866) Bush said he did, and that the letters represented a factory in Germany. (Tr. 866). Semsel said people can be fired or suspended for using offensive words. (Tr. 866-67). Bush replied that he never said anything about the words on the box. (Tr. 867). Williams replied that someone might be offended, and said that Respondent was issuing Bush a three-day suspension because of what had transpired. (Tr. 867).[23] Bush signed the discipline and left. (Tr. 867; GC Ex. 22). Respondent did not inform, or bargain with, the Union prior to the issuance of the discipline. (Tr. 58, 798, 907, 968).

Respondent, despite allegedly finding Bush's use of the box offense, continues to allow Domaradzki to use the box to store wooden trimmings with the letters facing out and visible to anyone walking past his work area. (Tr. 805, 806). No manager has ever talked to Domaradzki

[23] Bertozzi made the decision to issue the three-day suspension. (Tr. 1673).

about his use of that box nor has Domaradzki suffered any discipline due to his use of that box. (Tr. 805-06).

The record also demonstrates that Respondent's discipline for this type of offense varies greatly. In 2017, production employee Noel Pauley received a coaching note for being "disrespectful in communicating with his co-worker." (GC Ex. 62). Also in 2017, production employee Kevin Moore received a verbal warning for threatening to "kick another co-workers ass." (GC Ex. 63). In 2016, Respondent suspended Domaradzki for three days for describing a coworker using a racial slur. (Tr. 1675; R. Ex. 35). In November 2017, Respondent suspended employee Joe Kraebel for three days for use of an ethnic slur towards a coworker. (Tr. 1677; R. Ex. 36).

G. Respondent hires "working" supervisors to perform bargaining unit work and unilaterally grants wage increases to certain bargaining unit employees (Complaint paragraphs 11(a), (b), (d), (g), (h), (i))

1. Respondent hires unit members into "working supervisor" positions

At the parties' initial bargaining session in July 2017, Respondent informed the Union that it was considering hiring additional supervisors. (Tr. 77). Respondent provided no additional information. (Tr. 77, 967). In or around late August or early September 2017, Rosaci learned through a member of the unit that Respondent posted a job opening for three "Shop Supervisors," one for assembly and the machine shop (Bay 4), another for e-fab and saw cutting (Bay 1), and the third for material handling, paint shop, burn table, press brake, and service (Bay 2 and the yard). (Tr. 78, 1350; GC Ex. 26).

After reading the posting, Rosaci was concerned that the new supervisors would perform the work of the leadmen.[24] (Tr. 80-81). The job description states "[t]he Shop Supervisor is a working supervisor position." (R. Ex. 21). When these "working supervisor" positions were posted, the parties had not yet agreed whether leadmen should be part of the bargaining unit. (Tr. 80).[25] Rosaci immediately sent a letter to Bertozzi seeking clarification regarding the duties of the newly posted shop supervisors and requesting to bargain over the effects of hiring unit employees, and demanding that Respondent make no change to the duties of leadmen. (GC Ex. 27).

Then-unit members Donald Fess, Daniel Norway, and Americo Garcia interviewed for the open positions in or about September 2017. Garcia and Fess interviewed separately with Voigt, Howe, and Bertozzi.[26] (Tr. 1350, 1353-54, 1492). Garcia testified that during his interview, Howe said that the shop supervisor would perform production work 30-40% of the time. (Tr. 1356). Fess (who interviewed for the material handling opening) testified that he was told during his interview, that, as a supervisor, he would be expected to work on the shop floor and as a supervisor. (Tr. 1492).

During the September 15 bargaining session Respondent proposed contact language in an attempt to eliminate the concept of bargaining unit work.[27] (Tr. 83, GC Ex. 29). The Union rejected Respondent's proposal, and at no time during bargaining did the parties reach any agreement on the hiring of supervisors that would perform bargaining unit work. (Tr. 85-86).

---

[24] Leadmen are unit employees that perform bargaining unit work, possess expertise and experience, advise their co-workers, and offer them some direction. (Tr. 75).
[25] The leadmen classification was an issue the Regional Director deferred until after the election.
[26] Norway interviewed for the E-Fab opening with Howe. (Tr. 1568).
[27] Respondent's proposal stated "many different positions…outside the bargaining unit perform work similar to or even identical to those duties performed by members of the bargaining unit, such as statutory supervisors, managers…." (GC Ex. 29).

A September 22 memorandum of understanding resolved the leadman issue, ultimately including them in the bargaining unit. (Tr. 76; GC Ex. 25).

At the parties' next bargaining session on or about September 25, Respondent informed the Union that it was proceeding with the hiring of working supervisors. (Tr. 87-88, 783-85). By letter dated September 25, Respondent informed the Union that effective immediately unit members Fess, Garcia, and Norway, were being removed from the bargaining unit and promoted to shop supervisors. (GC Ex. 30). At around that same time, Respondent announced the promotions to the employees. (Tr. 669-70; GC Ex. 45, 55).

As the result of an information request, Rosaci later learned that the hourly wage rates of the three newly promoted working supervisors would increase to $24 per hour upon completion of a 90-day supervisory evaluation period. (Tr. 92; GC Ex. 31).[28] The Union was not provided with any opportunity to bargain over the change in the wage rates of Fess, Norway, or Garcia, and the parties never reached any such agreement. (Tr. 92, 791, 967).

2. The newly hired supervisors continue to perform bargaining unit work

Fess, Norway, and Garcia continue to perform bargaining unit work despite their alleged "promotion." Because Fess, for example, continues to perform the same work he did as a leadman, Respondent has not had to hire any additional material handlers to replace him. (Tr. 360, 701, 1495, 1522-23). Similarly, Respondent did not hire any additional production employees to backfill for Garcia and Norway following their promotions to supervisor positions. (Tr. 360, 1286). Respondent admits that it expected each of them to continue to perform production work, though it claims the production work is now less frequent. (Tr. 1287).

[28] At the time of their promotions, Fess made $21.09/hr, Norway made $21.03/hr and Garcia made $18/hr. (GC Ex. 31).

Respondent failed to provide any evidence to explain how it expected to maintain the same level of production with fewer employees. (Tr. 1286-87).[29]

In addition, these alleged supervisors do not have the independent authority to discipline employees. Howe testified that Fess, Norway, and Garcia may recommend discipline, but those recommendations are not always followed. (Tr. 1179). The specific duties Fess, Norway, and Garcia perform are explained in greater detail below.

Donald Fess

Several unit members consistently testified that Fess' day-to-day duties did not substantially change after he was named a working supervisor.[30] (Tr. 262, 360, 673-74, 697, 788). Prior to his "promotion," Fess was a material handler leadman and a member of the bargaining unit. (Tr. 261, 300, 492, 588, 672, 697, 1491). His responsibilities as a material handler included loading and unloading trucks, receiving material, preparing material to be shipped (often using a forklift), and maintaining the plant yard. (Tr. 360, 492, 672, 786, 788,

[29] The record also shows that Respondent promoted Erich Arendt from a fitter (a unit position) to a non-unit field service technician position in January 2018, and did not hire anyone to backfill the vacated fitter position. (Tr. 1315). Respondent entered evidence purporting to indicate that Arendt performed production work while working as a field service technician. (R. Ex. 18). However, not a single field technician testified as to the validity of the information, and Howe testified that he could not attest to the accuracy of Respondent's Exhibit 18. (Tr. 1317).

[30] Respondent attempts to track its employees' work day through a scanning system. (Tr. 1188). Employees are expected to scan in and out of jobs throughout the work day, and through those scans, Respondent is able to track what employees work on throughout the day. (Tr. 1188). The system is dependent on employees scanning or making manual corrections to their time. (Tr. 1992). Respondent admits that human errors occur – employees do not always scan or make manual corrections when changing jobs, and as such, Respondent's data in this regard is not accurate. (Tr. 1192, E. Ex. 14). Respondent separates work into two categories – "direct" and "indirect." (R. Ex. 14). Work charged directly to a customer work order is "direct" and work charged to a general ledger account is "indirect." (Tr. 1184). Direct work consists of fitting, welding, machine operation, machining and assembly. (Tr. 1185). Indirect work includes material handling, warehouse work facilities work, or any other work to service the plant itself. (Tr. 1185). Production work is included in both direct and indirect work. (Tr. 1184). Supervisory functions, if appropriately tracked, are considered indirect work. (Tr. 1185).

1491). After his "promotion" Fess continues to perform the same material handling work and utilizes the same equipment that he used as a leadman in the bargaining unit. (Tr. 259, 360, 495-96, 673, 697-700, 1522; GC Ex. 54). Fess maintains his forklift operation license and continues to move product with a forklift. (Tr. 1528). Fess also performs paint work in the paint booth area. (Tr. 1499).

Fess himself admitted that the biggest difference between his leadman and working supervisor duties is that he now makes the final decision regarding where incoming steel is transported within the plant. (Tr. 1502-03). Respondent made it clear that it expected Fess to continue to perform production work as a working supervisor. (Tr. 1287).

Since his promotion, Fess has never disciplined an employee. (Tr. 1506). There is no record evidence that Fess recommends disciplines either. Rather, Fess testified that a "group" of supervisors might recommend a discipline. (Tr. 1511; R. Ex. 23). Fess processes employee requests for time off, however he always approves those requests so long as employees provide 24 hours' notice. (Tr. 1507). Fess writes performance reviews of his direct reports, but makes no recommendation regarding employee pay.[31] (Tr. 1512).

Daniel Norway

Prior to being named a working supervisor, Norway was a fitter and a member of the bargaining unit. (Tr. 302-03, 496-98, 1562-63). In that role, Norway primarily did welding and fitting[32] work, and also assisted in scheduling saw cutting operations. (Tr. 302-03, 498, 703, 704).

[31] Bertozzi testified that Voigt reviewed all of Fess, Norway and Garcia's 2018 reviews of their direct reports. (Tr. 1695).

[32] Fitters tack pieces together to form a final product. (Tr. 1563, 1564). That product in then passed on to be welded. (Tr. 1563).

The record establishes that Norway fits and welds as much or more now than he did prior to his "promotion."[33] (Tr. 303, 361, 499). Norway testified that after his "promotion," he spent at least half of his time doing production work. (Tr. 1575-76). After being named a "supervisor" Norway ensures that the E-Fab employees have the parts they need to build their products, is responsible for selecting which employee performs a project, and answers employee questions. (Tr. 1569-71).

Norway has only been involved in two disciplines since being named supervisor. One resulted from an attendance infraction which did not require any independent judgment. (Tr. 1573). The other resulted from an employee's poor production. (Tr. 1573). On that occasion, Norway consulted with Voigt or Howe before disciplining the employee. (Tr. 1571). Norway does not approve time off requests, he merely passes employee requests on to human resources. (Tr. 1574).

Americo Garcia Jr.

Prior to being named a working supervisor in assembly, Garcia was a bargaining unit assembler. (Tr. 705, 707, 1349). Garcia built conveyers and loaded trucks. (Tr. 305, 363, 500, 671, 707). After his "promotion" Respondent expected Garcia to continue to perform production work. (Tr. 1287). The record establishes that after being named supervisor (until he was injured), Garcia regularly performed assembly work throughout the day. (Tr. 306, GC Ex. 53). Garcia testified that when he started as a working supervisor, he was not provided a dedicated desk or office, and spent more time performing production work than supervisory work. (Tr. 1358, 1424, 1426). This testimony is supported by contemporaneous notes from unit member Derek Muench.

[33] While Norway testified that he still fits but no longer welds as a supervisor, Norway received a discipline because he welded in an unsafe manner after his promotion. (GC Ex. 71).

These notes generally reflect Garcia's daily work activities from October 10, 2017 through December 9, 2017. (Tr. 708, 756-57; GC Ex. 53). Muench stopped taking notes around that time because Garcia was injured and no longer working on the plant floor. (Tr. 761, 1358-59, 1363, 1400). Those notes, and Muench's testimony, reflect that Garcia regularly engaged in work activities also performed by bargaining unit employees (assembly and welding) until his injury. (Tr. 710-36, 754, 758; GC Ex. 53). Since Garcia's return from injury in late January 2018, Garcia was given a light duty assignment he remains hobbled, performs mostly office work, and is not on the production floor. (Tr. 307, 363, 501, 707, 1364).

While Garcia can verbally address potential disciplinary issues with employees, he only issues disciplines after speaking with Voigt, human resources, and receiving approval from Bertozzi. (Tr. 1373-75, 1377-80, 1695). Employees submit time off request slips to Garcia who has never denied a request. (Tr. 1381). Garcia writes a draft evaluation for each employee, and then "collaborates" with Voigt to make necessary changes. (Tr. 1384). Employees come to Garcia with concerns in the workplace (for instance, a lack of tools). (Tr. 1389). Garcia presents those concerns to the plant manager, and makes recommendations regarding how to resolve the problem. (Tr. 1389-90). The record is silent as to whether those recommendations are followed.

H. Respondent lays off ten bargaining unit employees (Complaint paragraph 11(f), (g), and (i))

1. Respondent's business model

Respondent and its competitors sell to a relatively finite market of customers, and the Cheektowaga Plant is one of only 375 similar facilities throughout North America. (Tr. 1092). As such, Respondent is very responsive to potential sales opportunities. (Tr. 1092). The sales market in which Respondent operates is, by its nature, "cyclical" and often a "reflection of the

market." (Tr. 1096). Respondent utilizes an "infinite capacity model" which, during a hot sales market, allows it to take on as much business as possible. (Tr. 1097).

A successful sales process, which includes extensive discovery and price quotes, takes one to two years and culminates in a signed contract and deposit from the customer. (Tr. 1093). At that point, Respondent begins work consistent with the terms of the contract, and the account is transferred from the sales team to the project management team. (Tr. 1093). The first portion of that process is the initial engineering stage, which includes the creation and customer approval of project plans and drawings. (Tr. 1094). This stage takes 12-16 weeks. (Tr. 1093). As engineering work is completed, Respondent reengages the customer and schedules the remaining engineering work and all manufacturing and construction (both in-house and at the customers site) to comply with target dates. (Tr. 1098). From completion and customer approval of all plans and drawings, Respondent begins shipping its manufactured product to the customer in 30-50 weeks, depending on the size of the project. (Tr. 1100). Respondent services its already-sold manufactured products indefinitely. (Tr. 1100).

Bertozzi testified that due to the cyclical nature of Respondent's business, it is always difficult to predict Respondent's need for production employees. (Tr. 1634-35). Prior to 2015, during production surges, Respondent hired additional permanent employees, and laid them off when production work decreased. (Tr. 1633). Beginning in 2015, due to increased costs associated with laying off permanent employees, Respondent hired temporary workers during production surges. (Tr. 1634).

2. Respondent lays off ten bargaining unit employees

Respondent frequently increases production work towards the end of every calendar year, because, for tax purposes, many of its customers want their projects erected and installed before

the end of the year. (Tr. 1200). Consistent with that usual pattern, in or about Fall 2017, Respondent's production employees were busy meeting year-end deadlines on several orders. (Tr. 1200). However, around that same time, Howe became aware that there might be a shortage of new shop work after the end of the year unless Respondent was able to make additional sales, and as the year drew to a close, it was evident that there would not be enough production work for the shop beginning in or about January 2018. (Tr. 1201, 1203). Howe claimed that in late 2017, Respondent suffered a slowdown in new project bookings,[34] and while Respondent booked additional jobs in January and February 2018, it claims that those projects needed to be engineered for several weeks before starting production. (Tr. 1199, 1205, 1208). However, this is contradicted by a January 31, 2018 e-mail from Ginger Schroeder to Union attorney Michael Evans which termed the period around January 24 as "a period of intense production with overdue customer deadlines." (GC Ex. 38).

At a contract bargaining session on January 24, 2018, Respondent announced a layoff of unit employees. (Tr. 105, 914).[35] Howe stated that there was a lull in work at the shop, and that the lull suddenly came upon Respondent. (Tr. 105). Howe further stated that the layoff would affect 8-12 employees and that it would start on either February 9 or 16.[36] (Tr. 105). The Union immediately requested bargaining over the layoffs. (Tr. 105). The parties exchanged proposals,

[34] Respondent failed to provide any evidence regarding any specific sale or project that fell through.

[35] Respondent offered testimony regarding "a number" of prior layoffs. This including a layoff of approximately 15-20 employees of unspecified classifications in 2001, a layoff of approximately 10 production and 10 non-production employees in 2009, and a permanent layoff of approximately 12 production and 8 clerical employees in 2015. (Tr. 1617-33; R. Ex. 25, 26). Record evidence establishes that Respondent laid off several employees in 2002-2005 due to "normal ebbs and flows of work in our shop." (Tr. 1631-32; R. Ex. 27).

[36] The layoff only affected production employees. Office staff was not affected. (Tr. 1208).

but never reached any agreement regarding either the decision or the effects of the layoffs. (Tr. 107-08, 112, 892, 964, 1232-33; R. Ex. 2).

Respondent, by letter dated February 2, provided the Union with an explanation of its planned layoff selection process. (Tr. 1209, 1213; R. Ex. 16). Respondent identified ten employees exempt from layoff due to specialized and unique skills. (Tr. 895, 1213; R. Ex. 16). Respondent would numerically rate all employees a 0, 3, or 5 in 16 different categories representing the fundamental functions of the shop, and then add those ratings together. (Tr. 914-916; R. Ex. 16). Non-exempt employees would be sorted based on their accrued score, and layoffs would begin with the lowest-rated employee. (Tr. 895; R. Ex. 16). Respondent subsequently created a chart which ranked employees and delineated exempt employees as described in the February 2 letter and shared it with the Union during bargaining. (Tr. 895, 1211, 1213-14; R. Ex. 6).

On February 8, Respondent provided the Union with the names of the 10 production employees that were going to be laid off. (GC Ex. 40; Tr. 112, 891, 963, 1198). The layoff lasted approximately ten weeks. (Tr. 355).

I. Respondent punishes union leader William Hudson in retaliation for his union activity (Complaint paragraph 10(d) and (e))

Hudson has a duel reputation in the plant; union leader and exceptional welder. As discussed above, Hudson was the leader of the Union's organizing drive and serves on the Union's bargaining committee. *See*, Supra Part III.B. There is no dispute that Respondent is aware that Hudson is an open, active union supporter. (Tr. 1274). Hudson also has a well-

established reputation as the best welder in the plant. (Tr. 201, 242, 356, 674-75, 808).[37] He enjoys the nickname "Goldenrod" due to his welding skill. (Tr. 675, 808).

Not every job in the plant utilizes the same level of skill. For example, both management and production employees agree that welding is one of the highest-skilled jobs at the Plant. (Tr. 204, 530). Conversely, both management and production employees consider saw[38] operation to be one of the lowest skilled jobs. (Tr. 203, 229, 529, 677, 925). Employees consider work on either saw to be a "mindless" job. (Tr. 925). Generally, to complete their work, saw operators simply need to read a tape measure and operate the saw. (Tr. 1414-15). As such, the record reflects that only minimal training, up to a week, is needed to operate either saw. (Tr. 616, 1414-15). Sometimes employees are assigned to operate a saw without any prior training. (Tr. 829, 924). For these reasons, Respondent historically assigned less-skilled, junior welders and fitters to perform saw work when necessary.[39] (Tr. 522, 609-10). Respondent's more experienced welders and fitters are rarely asked to operate either saw and never for long periods of time. (Tr. 808, 841, 933, 935-36).

Hudson was among the employees laid off in February 2018. (Tr. 891; R. Ex. 6). This was due, in large measure, to Respondent's layoff ranking chart, which rated Hudson the third-lowest score among all production employees. (R. Ex. 6). Hudson received scores above zero in only two categories ("Weld A" and "P&G"). (R. Ex. 6). Hudson received a zero rating in 14 categories including "Saw." (Tr. 923; R. Ex. 6).

---

[37] Howe testified that Hudson is one of the "more talented welders" in the plant. (Tr. 1237).

[38] As part of its production operation, Respondent utilizes two large saws on a regular basis: the band saw and the cold saw. Both saws are used to cut structural material. (Tr. 528-29). Though the cold saw is smaller than the band saw, each saw can be operated by one employee. (Tr. 528-29).

[39] For example, in 2013 former supervisor Ken Schidel assigned welder/fitter Scott Rammacher to operate the saw when he was a new and less-experienced employee. (Tr. 531, 608-09).

On the morning of April 6, Hudson returned from layoff, and asked Garcia about his work assignment. (Tr. 893). Garcia told him that he would be working with Norway in Bay 1. (Tr. 893). Hudson spoke with Norway, and learned he was assigned to operate the band saw. (Tr. 894). Hudson replied that it was ironic that he received a zero rating on the saw and yet was being assigned to work the band saw. (Tr. 894). Norway replied "we all know you can work the saw." (Tr. 894). Hudson was not provided training on saw operation even though he had not operated the band saw for several years. (Tr. 896, 935-36).[40] Norway simply showed Hudson a pile of saw work orders and told him that he needed to get started. (Tr. 896).

Hudson immediately recognized the assignment as a punishment for his union activism. (Tr. 897). Hudson's co-workers, including Dale Thompson and Dennis Bush, were surprised by the assignment and also viewed it as punishment. (356, 842). Respondent's justification for the assignment shifted; Respondent claims that Hudson was assigned to the saw to increase his versatility, though Norway told Bush that Hudson was assigned to the saw because the temporary workers could not operate it. (Tr. 843-44, 1408). Hudson was not assigned work in the other 14 categories for which he received a zero rating.

Hudson was also not assigned to the saw simply because there was a lack of welding work. To the contrary, there was a substantial amount of welding work available when the laid off employees returned to work in April. (Tr. 677-78, 809, 810). In fact, nearly all of the

[40] According to Respondent, Hudson has never operated either saw in the production area. (Tr. 1215).

welder/fitters returned to their regular welding and fitting work.[41] (Tr. 355-56, 677-78, 810-11). When Zachery Krajewski and Mario Rojas returned from layoff, they both continued to perform welding work. (Tr. 1433). Respondent even assigned welding work to some employees that did not traditionally perform that work. (Tr. 908). Respondent also assigned welding work to several temporary workers (Gino, Wade, and Ken), all while Hudson worked the saw. (Tr. 811-12, 900-01).

Respondent's punishment also included refusing Hudson overtime. When Hudson observed the volume of work available, he asked for permission to work overtime, either welding or on the saw. (Tr. 896-97).[42] Respondent told Hudson that he was not approved for overtime. (Tr. 897). Over the next two weeks, Hudson asked to work overtime on three or four additional occasions, and was denied each time. (Tr. 898). Respondent's time records indicate that Hudson did not work overtime until April 26, and only worked two hours of overtime during all of April 2018. (GC Ex. 64).[43] Notably, Dale Thompson, who was assisting Hudson with saw work during a portion of that time, was allowed to work overtime. (Tr. 897).

His punishment was also protracted. While one of the working supervisors told Hudson that he would only be on the saw for two weeks, he ultimately worked the saw for at least six consecutive weeks for eight hours a day. (Tr. 810-11, 900). Respondent's scanning records show

[41] Employees that were moved to different jobs previously requested job transfers and all remained in their general areas of expertise. (Tr. 1408, 1409-10). For instance, Dmytro Rulov went from fitting one type of assembly to another type of assembly, Bush went from welding conveyers to a fitter/welder, Mario Rojas went from welding smaller items to welding larger items, and Zack Krajewski, who was only welding, was allowed to both paint and weld. (Tr. 1407, 1432). Hudson never requested to work on the saw.

[42] Whenever Respondent offers overtime, Hudson usually works between 6-10 hours of overtime per week. (Tr. 888).

[43] From January 1, 2018 through the layoff on February 6, 2018, Hudson worked approximately 13 hours of overtime. (GC Ex. 64).

that Hudson worked almost exclusively on the saw from April 6 to June 27, 2018, a span of nearly twelve weeks. (GC Ex. 64). Despite his "0" rating, Hudson only made one mistake (a mis-measurement) while operating the saw. (Tr. 926-28).

J. Respondent fails to (1) provide performance reviews and wage increases after the Union is certified (Complaint paragraph 10(c)), and (2) provide the Union with requested information (Complaint paragraph 12)

Historically, the production employee evaluation process began by determining employee wage increases. First, Respondent's upper management provided its first-line supervisors a baseline percentage. (Tr. 627, 1256, 1295, 1638, 1691). Then, first-line supervisors made recommendations to upper management regarding pay increases for each direct report.[44] (Tr. 508). An increase that was higher or lower than the provided baseline required justification[45] from the supervisor and approval from Howe and another upper-level Respondent manager.[46] (Tr. 514, 627, 1257, 1297-98, 1639, 1692-93).

Respondent conducted evaluations and provided corresponding wage increases for all employees around the same time, which was February or March. (Tr. 36, 131, 182, 190-91, 505, 507, 738-39, 775, 1254; Jt. Ex. 2(a) and (b)). Production employees received their written performance review during an in-person meeting with their immediate supervisor and the plant

[44] There is conflicting testimony in this regard. Former supervisor Jasztrab testified that he wrote the evaluation and recommended a raise, but the plant manager assigned the amount of wage increase without further input from the supervisor. (Tr. 1341, 1343).

[45] There is conflicting testimony regarding how often these recommendations were followed. For instance, Bertozzi testified that supervisor recommendations were "almost always followed." (Tr. 1639). While others testified that first-line supervisor recommendations for a higher-than-baseline wage increase were followed approximately half the time. (Tr. 513, 1257).

[46] Howe testified that he and Dan Voigt made the final determinations on wage increases, but there is also testimony that Respondent president, Tom Wendt, Jr. made that decision with Howe.

manager.[47] (Tr. 184, 1291). During these meetings employees first learned the amount of their wage increase, which went into effect around that same time. (Tr. 191, 247, 249 509, 928-29).[48]

Consistent with Respondent's established practice, production employees received an annual performance review and corresponding increase in or about March 2013 (for the 2012 calendar year), March 2014 (for the 2013 calendar year). (Tr. 191, 902-03; Jt. Ex. 2(a) and (b)).

In 2015 Respondent set a new precedent. In or about early 2015, following a round of layoffs, Respondent held an on-site meeting for all employees. (Tr. 185, 904, 1254-55, 1640). During this meeting, Respondent's President Thomas Wendt Jr. told employees to expect a slow year, and Bertozzi said Respondent was permanently moving reviews and wage increases to late September/early October (the end of the fiscal year). (Tr. 187, 905, 931-32, 1255-56). Bertozzi explained that the change allowed Respondent to better determine its financial state at the time of evaluations and wage increases.[49] (Tr. 187, 905). As a result of that meeting, employees expected to receive their next wage increase in or about September/October 2016.[50] (Tr. 905).

Respondent was true to its word. Employees received their next wage increase (and an accompanying review) in September/early October 2016, rather than in February/March. (Tr. 188, 905-06, 1642). Those reviews evaluated employee performance from January 1, 2015 through October 1, 2016. (Jt. Ex. 2(a)).

---

[47] These reviews are drafted by direct supervisors and reviewed by human resources "to make sure everything makes sense" before in-person sessions are held with the employee. (Tr. 1292-94).

[48] Employees were told not to discuss the amount of their wage increase with co-workers. Although such statements are unlawful, the General Counsel has not alleged any such statement as a violation of Section 8(a)(1) of the Act.

[49] Howe testified that it "made a lot of sense" to shift reviews to the end of the fiscal year. (Tr. 1258).

[50] Employees did receive performance reviews in early 2015 for the period January 1, 2014 – December 31, 2014, but did not receive any wage increases. (Tr. 1640; Jt. Ex. 2(a) and (b); GC Ex. 47, 48, 49, 50, 51, 52).

However, everything changed when the Union was elected. (Tr. 1643-44). While Respondent's non-unit employees received reviews and wage increases as expected in September/October 2017, represented employees did not receive performance reviews at all during the 2017 calendar year. (Tr. 738, 906, 1258, 1643). In or about November 2017, Respondent ignored Union requests for unit performance reviews and wage increases. (Tr. 36).

Unit members finally received performance reviews in April 2018, but the issue of wage increases had yet to be resolved. (Tr. 1259, Jt. Ex. 2(a) and (b)). At bargaining on May 8, 2018, Respondent proposed a 3.42% wage increase for all unit employees, retroactive to the date of the reviews, April 8, 2018. (Tr. 39, 137-38, 906, 1260, 1453, 1644; GC Ex. 8). At the parties' next bargaining session Rosaci verbally counter-proposed a 4% wage increase for all unit employees retroactive to October 2017. (Tr. 40, 1455, 1644). At bargaining on May 24, Respondent re-proposed its wage offer, writing that "retroactivity is a negotiated term" and that if the Union did not accept the proposal by June 20, it would rescind the "retroactivity portion" of its proposal. (Tr. 40-41, 138-39, 1260, 1455, 1645; GC Ex. 9). The Union did not agree with either the amount or retroactivity date in Respondent's wage proposal. (Tr. 41, 156, 1025, 1027). However, because employees had not received a wage increase in well over a year, Rosaci conditionally accepted the proposal, premised on continued bargaining on both the amount of the wage increase and the retroactivity date. (Tr. 41, 42, 140, 906, 970-71, 1025, 1027). In response, Respondent's attorney and lead spokesperson Schroeder stated "fair enough. You can bargain for that." (Tr. 41, 42, 907, 1028-29).

Also during bargaining on May 24, the Union requested information regarding the dates that non-unit employees received their wage increases. (Tr. 43, 907). The Union requested this information because it had learned that, historically, the unit and non-unit employees received

their wage increase around the same time. (Tr. 43). Respondent failed to reply to the Union's request at the bargaining table, so on May 29, the Union followed up with a written request. (Tr. 43; GC Ex. 10). In the written request, the Union asked "what was the date of wage increases for non-unit and office personnel?" (GC Ex. 10). On June 19, 2018, Schroeder replied to a portion of the Union's information request, but Respondent refused to provide the requested date of wage increases. (Tr. 45; GC Ex. 11). Instead, Respondent summarily informed the Union that "the Union does not represent the salaried workforce." (GC Ex. 11).

Undeterred, the Union sent Respondent a second written information request. (GC Ex. 12). In this June 22, 2018 letter, the Union's attorney explained that the requested information was relevant because it could impact the retroactivity of unit employee bonuses. (GC Ex. 12). The Union further reminded Respondent that it was still seeking greater retroactivity for the wage increases provided to the unit members. (GC Ex. 12). The Union concluded its written request by asking Respondent to "identify the dates non-bargaining unit employees received wage increases during the period of October 1, 2016 to the present." (GC Ex. 12). Two weeks later Respondent replied, again refusing to provide the requested information. (GC Ex. 13).

On July 11, 2018, the Union responded, again asserting that the information was relevant, that there was no agreed upon date for retroactivity so the information request remained ripe, and that the Union was still seeking the requested information. (GC Ex. 14). To date, there have been no further communications regarding this request and the Union still has not received the relevant information. (Tr. 50).

K. Respondent unlawfully requires shipping and receiving employees to work mandatory overtime (Complaint paragraph 11(c), (g), (i))

Shipping/receiving employees have a consistent work schedule. They work Monday through Friday, from 7 am – 3:30 pm and voluntarily work a few hours of overtime each week, either before or after the work day; weekend overtime is rare. (Tr. 645-48, 959, 961, 979 1486).[51] Shipping/receiving employees work overtime at their discretion, but might obtain pre-approval from management. (Tr. 646-48, 961). It is undisputed that shipping/receiving employees have consistently been allowed to reject overtime without penalty. (Tr. 1041, 1045-46, 1447, 1485).

Respondent does not have mandatory overtime in shipping/receiving. Testimony revealed that on the one occasion Respondent attempted to implement such a policy it was rescinded before it could be enforced. In or about 2011, Respondent's then–supervisor Robert Trzecki told the shipping/receiving employees that they had to work mandatory overtime on Saturdays or be fired. (Tr. 650, 657). After shipping/receiving employee Sean McCarthy informed upper management of Trzecki's edict, no shipping/receiving employees were required to work overtime. (Tr. 650-51).

In fact, Respondent admitted that it does not have mandatory overtime in any department. During a September 20, 2017 bargaining session, the Union made a proposal on overtime pay which included a provision barring Respondent from issuing discipline to employees that refused to work overtime. (Tr. 70; GC Ex. 24). Immediately in response, Respondent proposed that "overtime needed by the company shall be mandatory, with volunteers taken first, and mandated if insufficient to fill need by classification." (GC Ex. 24). At the parties' next bargaining session

[51] Hoerner works until 4:00 pm each day. (Tr. 1486). A Federal Express truck arrives between 3:00 and 4:00 every day. (Tr. 1446). Hoerner specifically testified that he is responsible for unloading that truck if it arrives after 3:30 pm. (Tr. 1486, 1489). If available, another shipping and receiving employee might assist him in unloading the truck. (Tr. 1486).

on September 29, Schroeder told the Union that Respondent did not, at that time, mandate overtime, and that Respondent made its proposal in an attempt to gain that right. (Tr. 72, 145). The parties failed to reach any agreement in regards to mandatory overtime. (Tr. 71, 800, 962).

On or about November 14, 2017, supervisors Michael Hoerner and Michael Dates told shipping/receiving employees Sean McCarthy and David Greiner that the shipping/receiving employees would be working overtime beginning the next day until further notice, until an existing backlog of work was cleared.[52] (Tr. 651, 652. 654, 958). McCarthy and Greiner asked how long, specifically, the overtime requirement would last, and were told as long as necessary. (Tr. 959, 981). Hoerner and Dates also said that they preferred the employees come in early at 6 am or work late until 4:30 pm. (Tr. 959, 981). As a result, McCarthy and Greiner worked overtime every day for the next few weeks. (Tr. 654, 981). During that period, McCarthy and Greiner worked substantially more overtime than usual. (Tr. 652, 654-55). Once the backlog cleared, Hoerner told McCarthy and Greiner that they were no longer required to work daily overtime. (Tr. 656, 960).

Respondent never informed the Union of its decision to mandate overtime for the shipping/receiving employees. (Tr. 72). The first time the Union learned of it was when unit member Greiner told Rosaci that he was mandated to work overtime after it had already begun. (Tr. 73, 145-46).

[52] The employees were required to work overtime from Monday through Friday while Saturday overtime remained voluntary. (Tr. 982). Respondent, in its Answer, admits that it required its shipping/receiving employees to work mandatory overtime. (GC Ex. 1[aa]).

L. Respondent unilaterally changed its policy concerning light duty work assignments (Complaint paragraph 11(e))

Historically, Respondent has not allowed its physically limited production employees to work light duty. (Tr. 874, 1253). In January 2018, Respondent, in response to an information request, acknowledged to the Union that it did not assign any unit employee light duty work for the prior three years. (GC Ex. 36, 37). In addition, during bargaining, Rosaci asked Respondent whether they offered light duty to their employees and Bertozzi responded that Respondent did not offer light duty to its employees. (Tr. 1661, 1662).

The evidence supports Respondent's "no light duty" policy. In 2009, unit member and welder Dale Thompson was injured at work. After several months out of work, Thompson's physician allowed him to return with certain restrictions – he could not lift fifty pounds, kneel, or stand on his feet for long periods. (Tr. 372-73). Respondent did not allow Thompson to return to work until he was able to perform his job without restrictions. (Tr. 365, 371-74). In 2010, unit member Robert Domaradzki experienced whiplash as a result of a car accident and his doctor recommended a light duty assignment by avoiding heavy lifting. (Tr. 792, 794, 814). Domaradzki's supervisor told him that Respondent did not offer light duty. (Tr. 794). Domaradzki continued his regular work as he could not afford lost wages. (Tr. 794).[53]

[53] Respondent tried to establish that production employees worked light duty. The provided documentation merely establishes that individuals were hurt on the job, visited a doctor, prescribed certain work restrictions, returned to work, and worked a certain number of hours. (R. Ex. 28-33). Respondent did not supply the type of work employees performed when they returned, which is necessary to determine their light duty status. (Tr. 1697; R. Ex. 28-33). Respondent presented Fess' self-serving testimony that he hurt himself at work in 2015 or 2016, for which his doctor prescribed one week of light duty. (Tr. 1530-31). Respondent failed to submit any supporting documentation. Similarly, Respondent presented testimony from Dates regarding a "vague" memory of an unnamed employee performing light duty work. (Tr. 1445, 1472-73). Dates could not recall the reason for the request, and Respondent failed to present any supporting documentation. (Tr. 1445, 1473).

Respondent unilaterally changed this policy after Union certification. Garcia suffered a workplace injury in early December 2017. (Tr. 1363). He returned to work in late January 2018 with a restriction that he perform only desk work. (Tr. 100, 1253, 1364; GC Ex. 66). Garcia worked primarily in an office, used a crutch to walk, and wore an open-toed boot. (Tr. 795, 818, 875, 1429). Garcia did not perform any assembly work while in that condition, and sat at a desk "100 percent" of the time. (Tr. 818, 875, 1364, 1429). Respondent described Garcia's status upon his return to work as "light duty." (GC Ex. 65). After Garcia returned to the floor, he was still recovering from his injury, and performed very little production work. (Tr. 1366, 1404). Garcia's light duty restrictions were removed in or about April or May 2018. (Tr. 1404). At no time before or after Garcia returned to work did Respondent provide the Union with an opportunity to bargain to the terms and conditions of Garcia's return to work. (Tr. 102, 797, Tr. 967-68).[54] The record establishes Respondent offered light duty to at least one other production employee, Kevin Farley, after Garcia was granted light duty work. (GC Ex. 58). The Union and Respondent have never reached agreement regarding light duty work. (Tr. 102, 800).

IV. ARGUMENT

A. Credibility assessments should favor the General Counsel

When considering contradictory testimony during a hearing, an administrative law judge is entitled to make appropriate credibility determinations. The Board allows ALJs to make "demeanor-based" credibility determination based on "nervousness of the witness, self-contradiction and evasiveness" while testifying. *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 421 (2004). Vague and evasive answers cut against witness' credibility. *Weather Tec.*, 238 NLRB 1535, 1555 (1978), enfd. 626 F.2d 868 (9th Cir. 1980); *Precision Plating*, 243 NLRB 230, 236

[54] Respondent did make a proposal regarding light duty on May 8, 2018, well after the events surrounding Garcia's light duty work. (Tr. 103).

(1979), enfd. 648 F.2d 1076 (6th Cir. 1981). On the other hand, testimony should be credited based on a witness' positive demeanor, including steady tone of voice, facial expressions, spontaneous manner of testimony, and positive attitude even on cross-examination. *See, Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Eastern Engineering & Elevator Co. v. NLRB*, 637 F 2d 191, 197 (3d Cir. 1980).

ALJs can also make credibility determinations "based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (citing *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989)); *see also Northridge Knitting Mills, Inc.*, 223 NLRB 230, 235 (1976). One "significant factor" considered in resolving credibility issues is that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest," *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996); *PPG Aerospace Industries, Inc.*, 335 NLRB 103, 104 (2010); *Farris Fashions*, 312 NLRB 547, 554 fn. 3 (1993), enfd. 32 F.3d 373 (8th Cir. 1994); *Circuit-Wise, Inc.*, 309 NLRB 905, 909 (1992); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961). Direct testimony responding to leading questions carries little weight and has no probative value. *T.M.I.*, 306 NLRB 499, 504 (1992); *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977). Damage to a witness' credibility through such a tactic cannot be readily undone. *Weather Tec Corporation*, 238 NLRB at 1555; *Liberty Coach Company, Inc.*, 128 NLRB 160, fn. 7 (1960).

While this case is factually dense, there are few facts in dispute that should need to be resolved by credibility determinations. In those instances, the General Counsel's witnesses should be credited. Any current employee witnesses were testifying against their own interest by

opening themselves up to potential retaliation by Respondent. Former employees that testified in the General Counsel's case are unbiased and have no reason to skew the facts. On the other hand, Respondent's witnesses were largely current supervisors (or employees Respondent is claiming are supervisors) testifying on behalf of their employer. The one former supervisor who testified on behalf of Respondent did so to protect his own reputation as someone who was a productive and effective manager. While General Counsel's witnesses testified to open ended questions with detailed clarity and unwavering specificity, Respondent's witnesses were inconsistent, vague, and evasive. Many of the best answers for Respondent were a result of leading, which have no probative value.

Respondent's testimony was often without foundation. For example, Howe testified as to the day-to-day duties of Fess, Norway, and Garcia after their promotions, but Howe admitted that he does not interact with Fess, Norway, or Garcia on a daily basis. (Tr. 1174). Similarly, Howe testified that in his "experience," it takes employees two to four weeks to "fully understand" the saw-cutting process. (Tr. 1219). Notably, Howe has never operated the saw, and there is no record evidence to indicate he is familiar with the saw-training process at all. (Tr. 1217-18). Such testimony should be considered unreliable. More egregiously, Respondent's supply chain manager Michael Dates testified to the content of a May 24 bargaining session while record evidence and testimony establishes that Dates did not attend any portion of that meeting. (Tr. 1455-56, 1687-88, 1699-1700). Similarly, Norway's testimony that he no longer welds as a "supervisor," is belied by a discipline he received after his promotion for welding in an unsafe manner. (GC Ex. 71). For the foregoing reasons General Counsel's witnesses should be credited over those presented by Respondent.

B. Respondent's threats, interrogations, and instructions to bargaining unit employees regarding their union activities violate Section 8(a)(1)

1. Respondent unlawfully interrogated Thompson

The Board's test for whether an interrogation of an employee is unlawful is set forth in *Rossmore House*, 269 NLRB 1176, fn. 20 (1984). There, the Board asserted that "an employer's questioning open and active union supporters about their union sentiments, in the absence of threats or promises, [does not] necessarily interfere[] with, restrain[], or coerce[] employees in violation of Section 8(a)(1)." *Rossmore House*, 269 NLRB at 1177-78. Rather, the Board stated it would consider such factors as "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Id.* at fn. 20 (citing *Bourne v. NLRB*, 332 F.2d 47 (2d. Cir. 1964)).

In this case, Respondent's plant manager Voigt approached unit employee Dale Thompson in his work area at the end of the day asking how Thompson liked his new role in E-Fab. (Tr. 346, 348). Thompson told Voigt that he was enjoying the change. (Tr. 346). His innocent questioning quickly turned threatening when Voigt asked Thompson if he would change his vote if a second union election were held. (Tr. 346, 347). Thompson answered by telling Voigt that he wouldn't change his vote because Respondent would fire his friends and coworkers. (Tr. 347). Voigt told Thompson that there were a lot of bad employees and he would like to get rid of them in the shop and one in the office. (Tr. 347).

Applying the *Rossmore* factors to this situation proves that Voigt coercively questioned Thompson. This conversation occurred only three months after an election in which the Union was certified as the collective-bargaining representative. There was also no legitimate basis for this question, given that no election could occur for another nine months. Voigt seemingly

wanted to know if Thompson would still vote in favor of the Union, but in reality, he was asking whether Thompson still supported the Union. It is well-settled Board law that questioning an employee about how he would vote in an election is considered unlawful. *Evergreen America Corp.*, 348 NLRB 178, 178 (2006).[55] This was additionally coercive because Thompson had just been put into the E-Fab department at his own request. This background, framing the question around his new and improved position, further highlights the coercive nature of Voigt's conduct.

Voigt, as the Plant Manager, is one of the highest-ranking officials employed at Respondent's Walden facility. (R Ex. 9 – October 19, 2017). Problematic questions posed by a high-ranking official is another factor supporting the finding of a violation, as the Board regularly takes into account the identity of the person conducting the questioning. *See, Bozzutos, Inc.*, 365 NLRB at slip op. at 2. Voigt's recent promotion to plant manager makes the interrogation even more problematic. In this role he could take adverse employment actions against the unit employees, which increases the weight of his interrogation.

The final factor, the place and method of the interrogation also weighs in favor of coercion. Voigt questioned Thompson in his new work area; the E-Fab department. This location was unfamiliar to Thompson as he testified that he had only started there about a week prior. This gave Voigt a situational advantage. Moreover, Thompson testified that no other employees were present, thus providing a sense of isolation in which coercion is more easily attainable. In

[55] Questioning of an open union supporter is considered less coercive by the Board than interrogation of employees whose sentiments are unknown. While Respondent may have thought that Thompson was a union supporter, there is no evidence that Respondent still held this opinion of Thompson at the time of Voigt's interrogation. Indeed, the nature of the question itself was an effort to ascertain whether Thompson still supported the Union. *See, Bozzutos, Inc.*, 365 NLRB No. 146, slip op. at 2 (2017).

sum, Voigt's questioning of Thompson about how he would vote in a new election violates Section 8(a)(1).

2. Respondent unlawfully interrogated George about union conversations

An employer's request that an employee report on the union activities of his or her fellow coworkers violates Section 8(a)(1). *See, e.g.*, *Metro Networks, Inc.*, 336 NLRB 63, 63 (2001) (employer asking employee to keep him "informed about what's going on" vis a vis an organizing drive violated Section 8(a)(1)); *Granite City Journal*, 262 NLRB 1153, 1155-56 (1982) (repeated employer requests for information regarding what occurred at union meetings violates Section 8(a)(1)); *Sussex Properties*, 283 NLRB 896, 896 (1987) (employer request that employee find out from other employees "what was going on with the Union" was unlawful).

Voigt's request in the instant matter, that George should tell him "anything you think I should know," is in the same vein as the above cases. (Tr. 284). The context of Voigt's request was a conversation regarding potential layoffs and internal union discussion regarding these layoffs. The sole reasonable conclusion to draw from Voigt's statement to George was that the employee needed to report to Voigt anything of interest that he might hear from other union-represented employees about their reactions to the proposed layoffs. Such a request clearly violates Section 8(a)(1).

Regarding the alleged interrogation, the Board has often found companion violations in cases involving an employer's request that unit employees report on the union activities of their coworkers. This was true in the Boards decisions in *Medical Express Ambulance Service, Inc.*, 350 NLRB 1, 4 (2007), *Metro Networks, Inc.*, 336 NLRB at 63, and *Granite City Journal*, 262 NLRB at 1155-56. The reasons for so doing are obvious: an employer's request for reports necessarily would also involve questioning the employee about what he or she learned in his or

her role as an informant. The same is true here: Voigt questioned George about what he had heard from other union employees regarding their reactions to the recent bargaining sessions, clearly fishing for information as to how employees were reacting to the announcement of layoffs. (Tr. 284). He sealed this unlawful conduct by attempting to make a pact with George that the employee would continue to report on the activities of his fellow coworkers. (Tr. 284). Voigt's questioning of George on January 25 also violates Section 8(a)(1).

3. Respondent's statements to Thompson about his family are unlawful

Voigt told Thompson that he liked him, didn't want to see the employee lose his job, and that he knew Thompson had a family to support. Otherwise unlawful statements or interrogations are not rendered harmless because the speaker addresses the listener in a friendly manner. *See*, *Vincent Et Vincent of Allentown Mall, Inc.*, 259 NLRB 1025, 1025 (1981) (citing *Electrical Fittings Corp., A Subsidiary of I-T-E Imperial Corporation*, 216 NLRB 1076 (1975) ("solicitation of [employee] to reject the union is, in itself, an 8(a)(1) violation regardless of the alleged non-coercive tenor of the supervisor's actual remarks during such conversation")) and *Cagle's, Inc.*, 234 NLRB 1148, 1150 (1978), enfd. in pertinent part 588 F.2d 943 (5th Cir. 1979)). *See also Isaacson-Carrico Manufacturing Company*, 200 NLRB 788, 788 (1972) (where the Board noted that "[i]nterrogation is no less coercive because it comes from a friend.").

The remainder of the analysis in this regard is straightforward. Voigt's assertions that he did not want Thompson to lose his job or ability to support his family were representing what consequences would ensue if Thompson continued to support the union. These statements, when viewed in conjunction with Voigt's earlier remarks that pro-union activity would get Thompson in trouble, demonstrate that Thompson's continued support of the Union would result in him losing his job and being unable to support his family. Statements of this nature are clearly

unlawful. *Kellwood Co.*, 299 NLRB 1026, 1026-27 (1990) (suggestion by supervisor that employee voting "yes" in upcoming election would jeopardize employee's ability to support his family was unlawful). These thinly veiled threats violate 8(a)(1).

4. Respondent's suggestion that George remove his Union shirt is unlawful

The legal standard regarding employees' rights to wear pro-union insignia, including T-shirts, was summarized by the Board in *Stabilus, Inc.*, 355 NLRB 836, 838 (2010) (footnotes omitted):

> [E]mployees have a Section 7 right to wear union insignia on their employer's premises, which may not be infringed, absent a showing of "special circumstances." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 (1945). These protections of Section 7 expression have always extended to articles of clothing, including prounion T-shirts. There is no basis in precedent for treating clothes displaying union insignia as categorically different from other union insignia, such as buttons. *See, e.g., Great Plains Coca-Cola Bottling Co.*, 311 NLRB [509, 515 (1993)] ("The Board treats article[s] of clothing the same as a button.").

"Special circumstances," as defined by the Board in this area, generally refers to uniform requirements for employees who deal with the public. *See, e.g., Noah's New York Bagels, Inc.*, 324 NLRB 266, 275 (1997) (employer lawfully instructed employee wearing altered shirt mocking employer's kosher policy while dealing with customers to remove this shirt); *Casa San Miguel, Inc.*, 320 NLRB 534, 540 (1995) (employee altered hospital smock to add pro-union message; employer was within rights to require removal of the message). Moreover, equating union activity with "trouble" also has a long and ignominious history in Board law, and has repeatedly been found to be unlawful. *See, e.g., Devon Gables Lodge & Apartments*, 237 NLRB 775, 776 (1978); *General Iron Corp.*, 218 NLRB 770, 770 (1975); and *Rupp Forge Co.*, 201 NLRB 393, 398-99 (1973).

In this case, Voigt suggested to George that he should take off his union shirt and that failing to do so could result in trouble. (Tr. 270). Before he walked away, Voigt finished the conversation by suggesting George button up his shirt and not let anybody else see it. (Tr. 270). While these were not direct orders, the implication was clear; take off your union shirt or else. Moreover Voigt underscored his initial statement by threatening, "that's how guys get in trouble around here." (Tr. 270). Voigt's comments unambiguously declared that employees would suffer consequences for wearing pro-union T-shirts. Voigt's suggestion that George cover up his union T-shirt and his implication that George would "get in trouble" if he did not do so clearly violate Section 8(a)(1).

5. Respondent unlawfully instructed George to remove his pro-union photograph from Facebook

Voigt instructing George to remove his pro-union photograph from his Facebook page violates the Act. Voigt did not directly order George to remove the photograph, but more obliquely referenced the same action ("I'd take that down if I was you. You'd probably get in less trouble wearing that stupid shirt then you would putting that on the internet." (Tr. 281)). Regarding "requests" from authoritative employer officials, the Board has held that "…reliance on the supposedly suggestive nature of [a supervisor's] request is misplaced." *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 7 (2015).

The Board in *Banner Estrella* also cited with approval the following language from an ALJ's decision in *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994), enfd. 83 F.3d 156 (6th Cir. 1996): "It makes no difference whether employees were 'asked' not to discuss their wage rates or ordered not to do so…[i]n the absence of a justification for the rule, it was an unlawful restraint on rights protected by Section 7…and violated Section 8(a)(1)." *Banner*

Estrella, 362 NLRB at fn. 14. Similarly, in *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), the Board found that the phrasing of a rule regarding discussion of salary was no less unlawful. The Board, relying on previous decisions in *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989) and *Waco, Inc.*, 273 NLRB 746, 748 (1984), held that "the finding of a violation is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." *Radisson Plaza Minneapolis*, 307 NLRB at 94.

It is immaterial that Voigt's comment to George about removing the pro-union photograph from Facebook was expressed as a suggestion rather than an order. The implication was made an explicit when Voigt stated that George would "get in trouble" if he did not remove the profile picture. Voigt clearly indicated that consequences would result from George failing to remove the photograph, belying the supposedly suggestive nature of the comment. Thus, this "suggestion" is also a violation of 8(a)(1).

6. Respondent unlawfully created impressions of Facebook surveillance

As stated by the Board in *Flexsteel Industries,* 311 NLRB 257, 257 (1993) (citing *Rood Industries,* 278 NLRB 160, 164 (1986)), "the test for whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance." Importantly, "[t]he Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance." *United Charter Service, Inc.*, 306 NLRB 150, 151 (1992). "Rather, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement." *Flexsteel Industries*, 311 NLRB at 257 (citing *Emerson Electric Co.*, 287 NLRB 1065 (1988)). An

employer is prohibited from "do[ing] something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003).

In *The Daily Grill*, 364 NLRB No. 36, slip op. at 1 (2016), the Board adopted the ALJ's finding that an employer representative had unlawfully created an impression of surveillance. In that case, the involved union made a video recording of employees presenting complaints to a manager, and posted this recording on the union's Facebook page. A supervisor who was not present at the aforementioned event told an employee who had attended the meeting that he saw the employee and was surprised that the employee in question was involved. The ALJ, relying on *Loudon Steel*, found that "the Respondent 'did something out of the ordinary' by taking the affirmative steps to go on the Union's Facebook page to view the protected activity, and then informing [the employee] it had done so." *Id.*, slip op. at 17. The Board added in a footnote adopting the ALJ's finding that "the coerciveness of [the supervisor]'s statements was heightened by the fact that, in the same conversation, [the supervisor] unlawfully interrogated [the employee] about his own and his coworkers' union activity." *Id.*, slip op at 1 fn. 4.

Voigt made two threats of Facebook surveillance. Voigt threatened George with surveillance. Importantly, George's uncontroverted testimony is that he, at the time the conversation occurred, was not Facebook friends with any of the office personnel or Voigt. Also crucial is George's response to Voigt, asking whether the Employer was spying on him, which clearly indicated that comments about his Facebook page were both unwanted and unprecedented. (Tr. 281). Thus, it is clear that Voigt,[56] by looking up George's Facebook profile, was acting well outside the norm. The coerciveness of Voigt's remarks, as with those made by

[56] Or, alternatively, someone in Respondent's office working on Voigt's behalf.

the supervisor in *The Daily Grill*, was amplified by his suggestion that George remove the union T-shirt as his profile picture which, for the reasons discussed below, was unlawful. Thus, Voigt's statement unlawfully created the impression of surveillance of George's protected activity.

Next, Voigt's statement that he would still be able to monitor Thompson's Facebook activities despite no longer being Thompson's Facebook friend, be it through creation of a fake profile or the use of two unnamed office workers, is unlawful. Similar to the situation with George discussed above, these statements clearly convey that Thompson's social media activities, including posting of pro-union paraphernalia on his Facebook page, was being monitored by the Employer. This is precisely the type of "out of the ordinary" actions which convey the impression of surveillance. *The Daily Grill*, 364 NLRB at 17. Thus, Voigt's comments in this regard are unlawful.

7. Respondent also unlawfully created the impression of surveillance about its security cameras

Voigt's statement regarding the placement of cameras outside the facility was clearly calculated to create the impression of surveillance, given that pro-union employees had recently taken to gathering in the parking lot during their breaks to engage in union activity. The implication from Voigt's statement was obvious, particularly given his colorful statement regarding the zooming ability of these cameras to include employee underwear: employees who engaged in pro-union activity in the parking lot would be monitored, and Respondent had the magnification capability to keep very close tabs on such activity. This statement violates Section 8(a)(1) by creating the impression of surveillance of an area in which employees exercise their Section 7 rights. *See, Milium Textile Services Co.*, 357 NLRB 2047, 2054 (2011) (employer created impression of surveillance by placing camera in break room where employees frequently

engaged in union activity). It should also be noted that while the cameras themselves might be visible, Voigt's comment went farther than simply reminding an employee of the existence of cameras. Voigt instead chose to fixate on the magnification capabilities of these cameras, thereby implying that Respondent had the ability to zoom in on whatever it chose in the parking lot, including employees' underwear and lettering on a T-shirt.

8. Respondent made unlawful statements about employee layoffs

Statements that an employer plans or wishes to rid itself of union supporters violate Section 8(a)(1). *Glengarry Contracting Industries, Inc.*, 258 NLRB 1167, 1167 fn. 3 (1981) (threats of loss of work directed at union supporters unlawful); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006). Indeed, in *Jupiter Medical Center Pavilion*, the Board held that a supervisor implying an employee should leave rather than engage in union activity was unlawful because such a statement "impl[ies] that support for the union is incompatible with continued employment." 346 NLRB at 651 (citing *Rolligon Corp.*, 254 NLRB 22 (1981)).

Voigt made threatening remarks in this regard twice, and both instances violate Section 8(a)(1). First, he told George that Respondent would lay off employees who had received discipline, and was slowing down work deliberately. (Tr. 272). Voigt went one step further to say, Respondent was "just taking it in the ass until all this goes away." (Tr. 272). When Voigt said "this" he clearly meant the Union. He also intimated that Respondent would bring in "new people" after business ramped back up, clearly indicating that Respondent would replace the laid off, pro-union employees with new workers who presumably would not support the Union. (Tr. 273). Voigt didn't even attempt to conceal his threat: Wendt employees could not support the Union if they wished to remain employed. This statement violates Section 8(a)(1).

Voigt's remark to Thompson that the Employer was going to lay off union supporters and keep the employees who did not support the Union is a violation of Section 8(a)(1). *See, Eldeco, Inc.*, 321 NLRB 857, 866-67 (1996) (employer violated 8(a)(1) when it stated that it was going to drug test applicants in attempt to "get rid" of pro-union employees); *Tidelands Marine Service, Inc.*, 140 NLRB 288, 290 (1962) (instructions to supervisors that they needed to find pretexts for terminations of union supporters unlawful). Voigt's other statement, suggesting the people who were laid off this time were the same people who would get laid off next time, demonstrates animus. Similar to the statements made to George, saying that layoffs will disproportionally impact Union supporters is unlawful.

9. Respondent included an unlawful threat during Rulov's evaluation

In *Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004), the Board found a violation of Section 8(a)(1) where an employer's supervisor engaged in conduct that "involved both a verbal outburst at an employee while simultaneously hitting his union button." The Board reasoned that the supervisor's actions "reasonably conveyed a threat of lower wages or unspecified reprisals in retaliation for employees' support for the [u]nion." *Id.* Perhaps more germane to the instant issue is the Board's decision in *Alexian Bros. Medical Center*, 307 NLRB 389 (1992). There, the Board determined that a supervisor's remark to an employee that he thought the employee's evaluation was poor was because of the union constituted a violation of Section 8(a)(1). *Id.* at 390. The Board noted that the supervisor's conjecture constituted a violation regardless of whether the employee's evaluation was poor because of his union activity. *Id.* at 389-90.

The instant case is similar to *Alexian Bros*. Rulov was informed, both orally by Voigt and in writing via his evaluation, that he was spending too much time on "non work related

activities." Voigt, took the extra step of pointing at Rulov's union button to demonstrate what, precisely, was meant by non-work related or outside matters.[57] Thus, Voigt's statement violates Section 8(a)(1).

C. Respondent violated employee Fricano's *Weingarten* rights by unlawfully refusing Fricano representation during an investigatory meeting

Board law regarding an employee's right to representation during an investigatory interview is well-established. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). The Board succinctly summarized its position in *Consolidated Edison Co. of New York, Inc.*, in noting that "*Weingarten* entitles an employee to union representation on request at an investigatory interview which the *employee reasonably believes* might result in his being disciplined." 323 NLRB 910, 910 (1997) (emphasis in original).

The right to representation, however, is not absolute and does not apply to any disciplinary meeting between employer and employee. In *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979), the Board established that "an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." The Board further stated the following:

> [A]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline.

[57] It is, of course, well-established that wearing of a pro-union button is activity protected by the Act. *Ichikoh Mfg., Inc.*, 312 NLRB 1022, 1024 (1993) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) and *Ohio Masonic Home*, 205 NLRB 357 (1973)).

Id. However, the Board cautioned that "if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary action, the full panoply of protections accorded the employee under *Weingarten* may be applicable." *Id.* The Board listed several examples, including attempts by an employer "to have the employee admit his alleged wrongdoing or to sign a statement to that effect." *Id.*

Here, there is no dispute that Voigt denied Fricano union representation at the October 25, 2017 meeting. On October 25, during work, Voigt asked Fricano to come to his office and discuss an incident regarding Fricano potentially operating the paint booth with a forklift inside. (Tr. 426, 434-35). Fricano immediately requested union representation. (Tr. 426-27, 436). Voigt responded "no, we're just going to go ask you a few questions about what happened."[58] (Tr. 428, 431, 436). Fricano and Voigt then went to Voigt's office. (Tr. 429). Also present in Voigt's office were Denise Williams from Respondent's human resources office, alleged supervisor Don Fess, and human resources coordinator Semsel. (Tr. 429, 437). Based on the above, it is clear that Fricano reasonably believed this investigatory interview would lead to discipline.

Respondent's subsequent conduct violates Section 8(a)(1). After Williams presented Fricano with a written discipline, she told Fricano that he would be terminated the next time he was disciplined, and asked him to sign it. (Tr. 429, 438-39; GC Ex. 19). In the portion of the document entitled "Details," Respondent wrote the following:

[58] There is no dispute that Fricano requested union representation or that Voigt denied that request. Indeed, Respondent's Answer admits it and Respondent presented no testimony to the contrary. (GC Ex. 1[aa]).

> On 10/23/17, John Fricano pulled a forklift into the paint booth and closed both overhead doors so he could proceed to paint the materials on the forklift. Rick Howe, Director of Operations, immediately stopped John due to the potential safety hazard of using flammable paint with the presence of anything that could cause a spark, which could result in igniting materials in the paint booth. If John proceeded to paint the materials on the forklift with both overhead doors shut as he intended, and if Rick hadn't stopped him, this may have resulted in severe injury to himself and others up to and including employee casualties. (GC Ex. 19).

The document also contains two boxes for employees to check, one stating "I agree with the above statements" and the other stating "I disagree with the above statements." (GC Ex. 19). Respondent required Fricano to check one of these boxes. Respondent's demand forced Fricano to make an admission concerning his alleged misconduct. In *Baton Rouge*, the Board found that "attempt[ing] to have the employee admit his alleged wrongdoing or to sign a statement to that effect" elevates an employer's "conduct beyond merely informing the employee of a previously made disciplinary decision" to that of an investigatory interview entitling an employee to his *Weingarten* rights. 246 NLRB at 997. In *Texaco, Inc.*, 251 NLRB 633, 636-37 (1980), the Board held that an employer strayed beyond the "ministerial" administration of discipline by securing an admission from the employee that he engaged in the conduct for which he was disciplined.[59] *See also Bentley University*, 361 NLRB 1038, 1038 fn. 4 (2014) (citing *Price Pfister, a Division of Norris Industries*, 256 NLRB 87, 89 (1981) (a meeting to mete out predetermined discipline was transformed into an investigatory interview when the employer's broad opening comment--"I understand you had some trouble in the department this morning"--elicited an admission of wrongdoing)).

[59] Although the employee in *Texaco* was accompanied by a union representative, the employer demanded the representative remain silent throughout the meeting. The Board held that this instruction had stymied the employee's *Weingarten* rights, as the representative was prevented from acting as a representative. *Id.*

D. Respondent's failure to notify the union about issuing discretionary disciplines to Fricano and Bush violate the Act

In *Total Security Management*, the Board discussed the issue of an employer's duty to bargain over discretionary discipline in a newly certified collective-bargaining relationship. 364 NLRB No. 106 (2016). The Board in pertinent part held as follows:

> [W]e reexamine de novo whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees, when a union has been certified or lawfully recognized as the employees' representative but has not yet entered into a collective-bargaining agreement with the employer. Having considered the issue, we again hold that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and that employers may not unilaterally impose serious discipline, as defined below.

Id., slip op. at 1. The Board defined "serious discipline" as "suspension, demotion, discharge, or analogous sanction." *Id.*, slip op. at 6.

The discretionary aspect of the violation involves whether to impose discipline in individual cases and the nature of the discipline to be imposed. *Total Security*, slip op. at 5. Establishing the use of discretion involves determining whether Respondent used any judgment instead of a fixed set of rules that involve no application of Respondent's reasoning or interpretation.

The Board in *Total Security Management* noted that "an employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances." *Id.*, slip op. at 11. The Board continued by stating that exigent circumstances exist "where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel." *Id.* The Board noted that this could include situations "that

pose[] a significant risk of exposing the employer to legal liability for the employee's conduct, or threatens safety, health, or security in or outside the workplace." *Id.*

On October 9 Union representative Rosaci sent a letter specifically requesting that Respondent provide the Union with notice and an opportunity to bargain disciplines. (GC Ex. 15). The uncontroverted facts establish that Respondent failed to give the Union the required notice and that Respondent uses discretion to issue disciplines. (Tr. 52; GC Ex. 7, 16, 17, 18). During a meeting between Respondent and the Union in November 2017, the parties reviewed several disciplines issued by Respondent. (Tr. 61-62). During the review, Rosaci stated that he did not believe the disciplined issued to one employee was appropriate due to his youth and inexperience. (Tr. 59). In response, Bertozzi stated that Respondent considered issuing the employee a verbal warning, but ultimately decided on a written warning based on the circumstances. (Tr. 59). Towards the end of the review of all disciplines, Howe stated that Respondent does not issue discipline to every employee for every violation. (Tr. 60-67). This demonstrates that Respondent uses discretion when it determines discipline for its employees, including the disciplines issued to Fricano and Bush.

1. Respondent used discretion when it suspended Fricano

In addressing Fricano's unpaid 3-day suspension, it is important to note that Fricano was suspended for *almost* operating the paint booth with a forklift inside. Indeed, the Employer's disciplinary notice is riddled with "ifs" and "could haves." (GC Ex. 19). Fricano was suspended for a "potential safety hazard." This clearly indicates that the Employer used discretion in determining the punishment for Fricano. Determining the level of the hazard and the likelihood of occurrence requires discretion.

Moreover, Respondent used discretion in treating similar violations differently. Respondent decided to give a verbal warning to Chris Dunning in 2011 for creating an "extremely dangerous" safety hazard while welding when he had a high pressure CO2 container unsecured to a welding machine. (GC Ex. 61). Respondent issued a three-day suspension to working supervisor Dan Norway (who had one prior discipline) for welding near flammable paint and creating a safety hazard. (GC Ex. 60). The decision to issue a suspension to Fricano, and only an oral counseling to Dunning, demonstrates discretion.

Moreover, Respondent maintains an Employment Manual ("Manual") which contains Respondent's disciplinary policy that it simply elected not to follow. (GC Ex. 23). The Manual classifies "Non-compliance to Plant Safety" as a "General Offense" subject to a four-step progressive discipline policy which includes a verbal warning for a first offense, written warning for a second offense, written warning plus three day suspension for a third offense and termination for a fourth offense. (GC Ex. 23, p. 50-51). As this was Fricano's first safety offense, he should have received a verbal warning rather than a three day suspension, as would have been the case for his third offense.

There is no issue with exigency here. Respondent clearly did not view Fricano as an imminent threat to employee safety. Voigt and Howe, two high-ranking management officials, witnessed his conduct and he was not immediately relieved of his duties. He was permitted to finish his shift on October 23, and it was not until the conclusion of his shift on October 25 that he was suspended. Thus, it is hard to view with any credulity an argument that exigent circumstances obviated Respondent's bargaining obligation.

2. Respondent's discretionary suspension of Bush was based on his union activity

Respondent used its discretion to suspend Dennis Bush because of his union activity. The first use of discretion was Respondent's determination that Bush had, contrary to his assertions, intended to emphasize the letters on the box. Respondent had to use discretion to make such a finding and then rely on that finding to reach its ultimate conclusion. Second, there was discretion when Respondent determined the severity of discipline. At the disciplinary meeting, held at the end of the next workday, human resources coordinator Semsel told Bush that people can be fired or suspended for using offensive words. (Tr. 866-67). Bush replied that he never said anything about the words on the box. (Tr. 867). Williams replied that someone might be offended, and said that Respondent was issuing Bush a three-day suspension because of his actions with the box. (Tr. 867). Semsel's initial reaction, to tell Bush that it could have fired him over the incident, but elected not to, demonstrates discretion.

Although Respondent tried to establish it consistently issues three-day suspensions to employees who make inappropriate remarks (Tr. 1675, 1677; R. Ex. 35, 36), it has not demonstrated that it has an inflexible policy regarding punishment for such conduct. (GC Ex. 62, 63). Respondent's past disciplinary history demonstrates that it exercises discretion in addressing what it deems "disrespectful communication." In 2017, production employee Noel Pauley received a coaching note for being "disrespectful in communicating with his co-worker." (GC Ex. 62). Also in 2017, production employee Kevin Moore received a verbal warning for threatening to "kick another co-workers ass." (GC Ex. 63). In 2016, Respondent suspended Domaradzki for three days for use of a racial slur to describe a coworker. (Tr. 1675; R. Ex. 35). In November 2017, Respondent suspended employee Joe Kraebel for three days for use of an ethnic slur towards a coworker. (Tr. 1677; R. Ex. 36). To make these determinations, Respondent

had to make crucial assessments regarding the facts to reach its ultimate conclusion of coaching note, verbal warning, or suspension. Differing outcomes makes obvious the use of discretion. These examples, coupled with Respondent's admission that it had the power to fire Bush but only issued him a suspension, establishes discretion.

Respondent does not contend and the evidence does not support that Bush's alleged conduct was so egregious as to obviate Respondent's obligation to bargain before imposing discipline. As with Fricano, Bush was not immediately removed from work despite his alleged misconduct. Indeed, it was not until the end of the next day that Bush was informed of and began serving his suspension. Any contention that this constitutes an exigency situation fails.

Moreover, Dennis Bush's staunch union support led Respondent to this determination. To establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983)); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee's protected activities (*see, e.g.*, *Austal USA, LLC*, 356 NLRB 363, 363 (2010) (unlawful motivation found where human resources director directly interrogated and threatened union activist, and

supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (*see, e.g.*, *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (*see, e.g.*, *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions *(see, e.g.*, *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (finding a discriminatory motive by relying on a prior Board decision regarding respondent's threatening conduct regarding alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (*see, e.g.*, *Lucky Cab Company*, 360 NLRB 271 (2014); *ManorCare Health Services – Easton*, 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)); *Cincinnati Truck Center*, 315 NLRB 554, 556-57 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. *See*, *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

Respondent admits that it was well aware of Bush's support for the Union. (Tr. 1238; GC Ex. 3). Respondent acknowledged receiving a certified letter dated January 24, 2018, from the Union featuring employees, including William Hudson, Dennis Bush, and Dale Thompson, wearing pro-union paraphernalia. (Tr. 30, 1537, 1593, GC Ex. 3). In addition, Bush is a visible and vocal supporter. Specifically, Bush attends weekly lunchtime pro-union rallies where he holds up pro-union signs in the presence of management. (Tr. 528, 845, 848). Bush frequently wears a pro-union shirt (with the union logo visible) and button,[60] adorns his welding helmets and car with pro-union stickers, and speaks favorably about the union with his co-workers.[61] (Tr. 528, 669, 845-46, 848-49). Bush also spoke with members of management about the Union both before and after the union election. Respondent admits that it was well aware of Bush's support for the Union. (Tr. 1238; GC Ex. 3).

The types of activities that Bush engaged in are the exact same type that Respondent has evinced animus against (i.e., wearing union T-shirts, lunchtime rallies, etc.). *See*, Supra Part

[60] Bush started wearing pro-Union shirts approximately one month after the election, and started to wear pro-union buttons several months later. (Tr. 845-46, 876-77).

[61] In or about spring 2017, in the presence of Howe and unit member Robert Showler, Scheidel asked Bush why he was wearing union colors, because Scheidel believed Bush opposed the Union. Bush replied that he was representing his "fellow brothers." (Tr. 851-53).

IV.B. Respondent's decision to suspend Bush was to discourage his union support. There is no evidence Respondent would have taken the same action absent Bush's union activity, for no one else has been disciplined for the same conduct. Indeed, Respondent went out of its way to tell an employee that it was targeting union employees for discipline so that it could rid itself of union supporters. (Tr. 271-72). Thus, Bush's suspension violated Section 8(a)(3) and (5) of the Act.

E. Respondent's actions regarding Garcia, Norway, and Fess in fall 2017 are unlawful

1. Respondent violated the Act by unilaterally removing employees from the bargaining unit

The Board has long held that an employer's unilateral alteration of the makeup of a bargaining unit constitutes a violation of Section 8(a)(1) and (5) of the Act. "It is well established that 'once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that [sic] positions without first securing the consent of the union or the Board.'" *Wackenhut Corporation*, 345 NLRB 850, 852 (2005) (quoting *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)). As such, while employers are entitled to promote unit members to supervisory position, employers are not permitted to simply remove employees from the unit "under the guise of promoting [the unit employee] to a supervisory position." *Facet Enterprises*, 290 NLRB 152, 152 (1988); *see also e.g., Idaho Statesman*, 281 NLRB 272, 275 (1986) ("It does not follow, however, that an employer, under the guise of the transfer of unit work, may alter the composition of the bargaining unit. To do so would not only modify the job functions of the various members but also affect their right to representation.").

Here, Respondent unilaterally removed three unit members (Fess, Garcia, and Norway) under the guise of promoting them to "working supervisor" positions. The record reflects that

Respondent failed to bestow any supervisory authority upon them, illustrating that Respondent's unilateral action violated Section 8(a)(1) and (5) of the Act.

Respondent made its intent to blur the lines between unit and non-unit work throughout the unionization process clear by seeking, in bargaining, the right to allow non-unit members to perform bargaining unit work. Prior to certification, Respondent attempted to exclude leadmen from the bargaining unit, but ultimately agreed to include them in the unit. (Tr. 75-76; GC Ex. 2). During first contract bargaining, Respondent attempted to eliminate the concept of bargaining unit work, thereby allowing non-unit members to perform traditional production work. (Tr. 83-86; GC Ex. 29). At no time did the Union agree to allow non-unit members to perform bargaining unit work. (Tr. 86). Because Respondent failed to achieve its goals through legitimate bargaining, it instead attempted an end run by posting for and then hiring three working supervisors. (Tr. 77, 967; GC Ex. 26).

The record reflects that none of the three working supervisors[62] exercise supervisory authority. Notably, Respondent bears the burden of establishing the supervisory status of the three employees at issue. *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1107 fn. 4 (1997). Respondent failed to meet that burden. Section 2(11) of the Act defines a supervisor as:

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[62] Merely providing employees with a supervisory job title is insufficient to establish supervisory status. *See, Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1360 (2000).

Fess, Garcia and Norway all testified regarding their ability to discipline employees. Fess has never disciplined an employee, and there is no record evidence that he recommends discipline (in fact, Fess testified that a "group" of supervisors might recommend discipline). (Tr. 1511; R. Ex. 23). Garcia and Norway can only issue discipline after consulting with upper management, and therefore lack statutory supervisory authority in that regard because the "authority to discipline other employees is not determinative (of supervisory status) unless it is exercised using independent judgment." *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip. op. at 2 (2015). (Tr. 1373-75, 1377-80, 1506, 1571, 1695).

The Board analyzes whether an employee's authority to evaluate others represents an "effective recommendation" of promotions or wage increases. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). If the evaluation, on its own, does not affect wages and/or job status of the individual being evaluated, the Board will not find the evaluating employee to be a supervisor on that basis. *See*, *Williamette Industries, Inc.*, 743, 743 (2001). The record reflects that all three working supervisors have (or will be expected to) evaluate employees. (Jt. Ex. 2). However, the record further reflects that those evaluations play little, if any, role in determining wage increases or job promotions for the evaluated employee. Upper management sets a baseline pay increase for all production employees, and any first-line supervisor recommendation to deviate from that baseline increase must be approved by upper management. (Tr. 513, 1257, 1692). The record is silent as to whether evaluations play any role in employee promotions. As such, Respondent failed to establish that the working supervisors exercised supervisory authority in this regard.

Respondent offered only conclusory testimony regarding the working supervisors' ability to assign work to employees. To the extent Fess, Norway, or Garcia gave their colleagues any

direction, the mere assignment of routine work does not establish supervisory status. *Ohio River Co.*, 303 NLRB 696, 715 (1991) (citing *Sears, Roebuck & Co.*, 292 NLRB 753 (1989)). The record is silent regarding the working supervisors' ability to hire, transfer, suspend, discharge, layoff or responsibly direct employees. (Tr. 1178).

Respondent failed to establish that Fess, Garcia, or Norway exercised any indicia of supervisory authority; therefore, it is clear that they were not actually "promoted" and were simply removed from the unit as a "guise." *Facet Enterprises*, 290 NLRB at 152; *Idaho Statesman*, 281 NLRB at 275. As such, Respondent's unilateral removal of Fess, Garcia, and Norway from the bargaining unit violates Section 8(a)(1) and (5) of the Act.

2. Respondent unilaterally granted wage increases to members of the bargaining unit

Respondent violated Section 8(a)(5) of the Act by unilaterally granting wage increases to unit members Fess, Garcia, and Norway. As previously noted, employers cannot make unilateral changes to mandatory subjects of bargaining without a valid impasse. *NLRB v. Katz*, 369 US 736 (1962). Wages are a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp.*, 356 US 342, 348 (1958). Unilateral changes to wages that benefit employees do not excuse a violation of the Act. *Allied Mechanical Services*, 332 NLRB 1600, 1609 (2001); *Randolph Children's Home*, 309 NLRB 341, fn. 3 (1992).

In the instant matter, there is no dispute that, without notice or bargaining with the Union, Respondent increased the wage rates of Fess, Garcia, and Norway 90 days after they were promoted to working supervisors. (Tr. 92, 791, 967; GC Ex. 31). Respondent's action violated Section 8(a)(1) and (5) of the Act because Fess, Garcia, and Norway remained members of the bargaining unit following these "promotions."

3. Respondent unlawfully changed its light duty policy

Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally allowing unit employee Americo Garcia to work light duty in January 2018. The Board has long held that light duty work is a mandatory subject of bargaining. *Jones Dairy Farm*, 295 NLRB 113, 115 (1989); *Dorsey Trailers, Inc.*, 327 NLRB 835, fn. 7 (1999); *Southern California Edison Co.*, 284 NLRB 1205, fn.1 (1989). Further, an employer is barred from making unilateral changes even if they result in improved working conditions. *Grosvenor Resort*, 336 NLRB 613, 617 (2001). Therefore, the unilateral implementation of a light duty policy during the course of ongoing contract negotiations violates Section 8(a)(1) and (5) of the Act.

The record contains consistent witness testimony that, prior to the Union's certification, Respondent refused to offer its production employees the opportunity to work light duty, and told production employees that light duty work was not available. (Tr. 365, 371-74, 794). Further, Respondent failed to present any evidence of a written light duty policy. Consistent with witness testimony and the absence of any written light duty policy, Respondent informed the Union during contract bargaining, that it did not offer light duty to its production employees. (Tr. 1661, 1662). Further, Respondent, in January 2018, informed the Union that it had not assigned light duty work to any unit employee in the past three years. (GC Ex. 36, 37). While Respondent may argue that it offered light duty work prior to certification, it failed to present any

documentation in support of that assertion.[63] In sum, the record reveals that Respondent did not offer its production employees the opportunity to perform light duty work at any time prior to the Union's certification.

There is no dispute that in January 2018, while the parties were engaged in first contract negotiations, unit member Garcia returned to work from an injury and Respondent allowed him to work light duty (and perform no physical labor) while recovering from that injury. (Tr. 100, 795, 818, 875, 1253, 1363-64; GC Ex. 65). Garcia was not the only employee granted light duty status in contravention with its previous policy. The record establishes Respondent offered light duty to at least one other production employee, Kevin Farley, after Garcia was granted light duty work. (GC Ex. 58). It is also undisputed that Respondent never provided the Union, at any time prior to January 2018, with an opportunity to bargain over any aspect of light duty, or the specific terms of Garcia or Farley's return to work. (Tr. 102, 797, 968-69). Further, the parties have never reached any agreement regarding production employees working light duty. (Tr. 102, 800).

Because there is no evidence of any prior light duty policy, or any record evidence that Respondent's decision to provide Garcia or Farley with light duty work was consistent with its practices, Respondent's implementation of a light duty policy without first bargaining with the

[63] While Fess testified that he worked light duty in either 2015 or 2016 while working as a production employee, Respondent's management, in communications with the Union, and consistent with the testimony of General Counsel witnesses, refute Fess' claim. (Tr. 1530-31; GC Ex. 36, 37). Notably, all other record evidence refutes Fess' claim, and actually illustrates that, before the Union's certification, Respondent refused to grant light duty opportunities to production employees. (Tr. 365, 371-74, 794; GC Ex. 36, 37). In fact, Respondent failed to provide any documentation in support of its claim in this regard. Respondent cannot rely on asserted pre-certification historical rights, rather than an established pre-certification past practice, to make a unilateral change to terms and conditions after certification. *Goya Foods of Florida*, 347 NLRB 1118, 1120 (2006).

Union to an agreement amounts to an unlawful unilateral change in violation of Section 8(a)(1) and (5) of the Act.

4. If Garcia, Norway, and Fess were lawfully promoted out of the bargaining unit, than Respondent unilaterally removed bargaining unit work from the bargaining unit and assigned it to non-unit employees

Even if the fact-finder determines that Fess, Garcia, and Norway are statutory supervisors, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally assigning them bargaining unit work.

It is well-established Board law that the reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining. *Land O'Lakes, Inc.*, 299 NLRB 982, 986-87 (1990); *Hampton House*, 317 NLRB 1005, 1005 (1995). As such, an employer's failure to bargain over the decision and effects of its decision to transfer unit work to Fess, Garcia, and Norway after leaving the bargaining unit constitutes a violation of Section 8(a)(1) and (5) of the Act. *Seaport Printing & Ad Specialties*, 351 NLRB 1269, 1270 (2007).[64]

The record establishes that Fess, Garcia, and Norway continued to perform bargaining unit production work on a regular and recurring basis after being named "working supervisors." *See*, Supra Part III.G. Fess continues to perform the same material handling work, uses the same equipment and maintains the same operating license that he used while a member of the bargaining unit. (Tr. 259, 262, 360, 495-96, 673-74, 697-700, 788, 1522, 1528; GC Ex. 54). Norway continues to perform the same fitting and welding work that he did while a member of

[64] Any Respondent argument that the Union failed to timely request bargaining over this unilateral change lacks merit as the Union requested bargain over the subject by letter dated September 1, 2017 (even before Respondent informed the Union of its decision to hire Fess, Garcia, and Norway as working supervisors). (GC Ex. 27). Further, when Respondent informed the Union of its decision to hire working supervisors, any request to bargain would have been futile as Respondent already made the decision unilaterally. *See, AT&T Corp.*, 325 NLRB 150, fn. 1 (1997).

the bargaining unit. (Tr. 303, 361, 499, 1575-1576). Prior to his injury (and after his promotion), Garcia continued to perform the same assembly work that he performed while a member of the bargaining unit. (Tr. 1358-59, 1363, 1400). Respondent advertised that employees hired into those positions should expect to perform bargaining unit work, and Respondent expected Fess, Norway and Garcia to perform bargaining unit work upon their promotions. (Tr. 1287; GC Ex. 26; R. Ex. 21). Notably, Respondent did not hire any production employees after promoting Fess, Garcia and Norway to working supervisor positions, indicating that Respondent expected those individuals to perform as much production work as they did prior to their promotions. (Tr. 360, 701, 1286, 1495, 1522-23).

Any Respondent argument that its pre-certification use of supervisors to perform production work permits post-certification use of supervisors to perform bargaining unit work fails, because it is "well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain about the subsequent implementation of past practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees." *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001); *Porta-King Building Systems*, 310 NLRB 539, 543 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994); *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976), enfd. 559 F.2d 187 (D.C. Cir. 1977); *see also Adair Standish Corp.*, 292 NLRB 890, fn. 1 (1989).

The record is clear that Respondent, without bargaining to agreement with the Union, employed non-unit supervisors to perform bargaining unit work. Thus, Respondent violated Section 8(a)(1) and (5) of the Act.

F. Respondent failed to provide annual performance reviews and wage increases to its employees

1. Respondent's failure to provide performance evaluations and wage increases is an adverse employment action that violates Section 8(a)(3) of the Act

An adverse employment action that is motivated by employee membership or activities on behalf of a labor organization violates Section 8(a)(3) of the Act. The Board utilizes the burden-shifting analysis set forth in its *Wright Line* decision to determine whether an adverse employment action violates Section 8(a)(3) of the Act. Under *Wright Line*, the General Counsel has the initial burden of establishing a prima facie case. A prima facie case is established by a showing of four elements: (1) the alleged discriminate was engaged in union activities; (2) the employer had knowledge of those activities; (3) the employer took an adverse employment action against the discriminatee; and (4) there is a link or nexus between the union activity and the adverse employment action. *See*, *Hays Corp.*, 334 NLRB 48, 49 (2001).

There is no dispute that Respondent's employees were engaged in union activity and that Respondent had knowledge of those activities at or around September/October 2017, the time employees should have received their annual performance reviews and wage increases. The Union started to organize Respondent's employees in March/April 2017, employees elected the Union as its bargaining representative, and in June 2017 the Union was certified as the employees' bargaining representative. (Tr. 26, 28; GC Ex. 2). Respondent's knowledge of its employees union campaign is further demonstrated by the multiple meetings it held to discourage unionization, the litany of unlawful anti-union statements uttered by Respondent's supervisor, and Respondent's admission that its employees were open and obvious about their support for the Union both during the campaign and following the election. (Tr. 270-72, 281, 350, 404, 407, 1594, 1596-601; R. Ex. 23).

Board law establishes that an employer's suspension of annual performance reviews and wage increases constitutes an adverse employment action. *United Rentals*, 350 NLRB 951, 951-52 (2007). Here, the record illustrates that Respondent annually issues performance reviews and corresponding wage increases to its production employees. (Tr. 131, 182, 190, 507, 738; Jt. Ex. 2(a) and (b)). Respondent traditionally held those reviews in February or March and employees received wage increases shortly thereafter. (Tr. Tr. 36, 182, 190-91, 249, 505, 738, 775, 1254; Jt. Ex. 2(a) and (b)). In 2015, Respondent informed employees of its decision to permanently move performance reviews and wage increase to align with Respondent's fiscal year. (Tr. 187, 905, 931-32, 1255-56, 1258). As a result, beginning in 2016, production employees expected to, and did, receive their annual performance reviews and wage increases in September and October 2016. (Tr. 188, 905-06, 1642). However, following the June 19, 2017 certification, production employees did not receive reviews or wage increases at any time during the 2017 calendar year. (Tr. 738, 906, 1258, 1643). Respondent's failure to provide expected performance reviews and wage increases in 2017 constitutes an adverse employment action.

Lastly, the record establishes a clear link between the production employees' union activity and Respondent's refusal to provide performance reviews and wage increases in September/October 2017. Respondent has a well-established practice of providing both production (bargaining unit) and office employees with annual reviews and wage increases at the same time. (Tr. 36, 131, 182, 190-91, 505, 507, 738, 775, 1254; Jt. Ex. 2(a) and (b)). That practice ceased for production employees after the Union started to organize production employees in March/April 2017 and was certified as the bargaining representative of those employees three months later. (Tr. 26, 28; GC Ex. 2). Notably, Respondent's non-unit employees

did receive their performance reviews and wage increases in September/October 2017. (Tr. 1258, 1643).

Respondent clearly opposed the Union during the organizing drive, as evidenced by Respondent holding several meetings to discourage unionization and attempts to identify the leaders of the drive. (Tr. 179-81). Further, after the organizing drive, and in the months before Respondent's refusal to provide performance reviews and wage increases, Respondent's plant manager made several unlawful statements to production employees regarding their support for the union. (Tr. 270-72, 281, 346-47, 354-55, 376, 404, 407). Importantly, Respondent's vice president of finance admitted that the election of the Union was the reason production employees did not receive performance reviews and wage increase in 2017. (Tr. 1643-44). *See, United Aircraft Corporation (Boron Filament Plant)*, 199 NLRB 658, 662 (1972) (employer's refusal to grant expected wage increase announced one year earlier, before the union was elected, violated Section 8(a)(3) of the Act).

Respondent's refusal is a violation of Section 8(a)(3) of the Act because the employees' decision to elect the Union as their bargaining representative was clearly a motivating factor in Respondent's refusal to grant scheduled performance reviews and wage increases in September/October 2017.

2. Respondent's actions regarding performance reviews also violates Section 8(a)(5)

Section 8(a)(5) of the Act requires an employer to provide employees' bargaining representative with notice and an opportunity to bargain before making changes to mandatory subjects of bargaining. *NLRB v. Katz*, 369 US 736 (1962). Performance evaluations that have the

potential to affect employee wage rates are mandatory subjects of bargaining. *Saginaw Control & Engineering*, 339 NLRB 541, 543 (2003).

An employer that creates a bargaining unit expectation of a term or condition of employment violates Section 8(a)(5) of the Act when it unilaterally alters that expectation. In *Laredo Coca Cola Bottling*, 241 NLRB 167, 174 (1979), the Board upheld an ALJ's determination that an employer violated Section 8(a)(3) and 8(a)(5) of the Act by eliminating a holiday bonus. In *Laredo*, the employer paid a holiday bonus to its then non-unionized employees in 1974. *Id.* In 1975, the employer told employees they could expect those bonuses to be paid annually thereafter. *Id.* The employer paid those bonuses in 1975 and 1976. *Id.* In August 1977, the employees voted in a union, and later that year, the employer failed to pay the holiday bonus. *Id.* In finding the employer's failure to pay the bonus unlawful, the ALJ determined that the employer made an "explicit promise" to its employees, and that "a promise of a wage increase is sufficient to create a statutory condition of employment." *Id.* at 174; *see also United Aircraft Corporation*, 199 NLRB at 662.

Here, the record reflects that Respondent had a well-established practice of annually providing production employees annual wage increases tied to performance reviews in or about February or March. (Tr. 36, 182, 190-91, 505, 738, 775, 902, 1254; Jt. Ex. 2). Respondent created a new expectation for the timing of performance reviews and wage increases by announcing to its employees in 2015 that in it was permanently moving the timing of the performance reviews and wage increases to September/October to align with the fiscal year beginning in 2016. (Tr. 187, 905, 931-32, 1255-56). Consistent with that announcement, employees received their next reviews and wage increases in September/October 2016. (Tr. 905). However, following the Union's election and certification, production employees did not receive

performance reviews or a wage increase in September/October (or any other time in) 2017. (Tr. 738, 906, 1258, 1643). Respondent did not bargain that decision with the Union, and ignored Union requests for performance reviews and wage increase in November 2017. (Tr. 36). By unilaterally altering the timing of performance reviews and wage increases, Respondent deprived unit members of expected increased earnings and violated Section 8(a)(5) of the Act. *See, Laredo Coca Cola Bottling*, 241 NLRB at 174 ; *United Aircraft Corporation*, 199 NLRB at 662.

G. Respondent failed to respond to an information request

The party requesting information related to non-bargaining unit employees must demonstrate the relevance. *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985) (citing *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975) and *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d. Cir. 1965)). The burden of demonstrating relevance is low, as the standard is a "liberal discovery-type standard." *Loral Electronic Systems*, 253 NLRB 851, 853 (1980) (quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)). Moreover, it is well established that "information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it." *Pfizer, Inc.*, 268 NLRB at 918.

In the instant matter, the Union made multiple information requests for the non-bargaining unit wage increase and timing of the annual performance review and has clearly demonstrated the relevance of the information. The Board has repeatedly found unlawful an employer's failure to provide non-unit information requested for the purpose of formulating bargaining proposals. *See, e.g.*, *Amphlett Printing Company*, 237 NLRB 955, 956 (1978), remanded on other grounds; *Press Democrat Publishing v. NLRB*, 629 F.2d 1320 (9th Cir. 1980) (information regarding non-unit employee wage levels relevant for union to formulate wage proposals); *Caldwell Manufacturing Company*, 346 NLRB 1159, 1160 (2006) (employer had

obligation to provide certain financial information on which it had premised its bargaining proposals, as union had right to verify employer assertions and develop appropriate counterproposals). The non-bargaining unit wage increase and timing information is relevant for the Union to formulate retroactivity proposals for the unit employees. The requested information remains relevant as bargaining on the retroactivity component is ongoing and the Union made it clear that the purpose behind the request was bargaining the wage increase retroactivity. The requested information is relevant and should be provided to the Union.

H. Starting in November 2017 Respondent unlawfully required mandatory overtime

It is well-established that overtime is a mandatory subject of bargaining. *Michigan Sprinkler Co.*, 308 NLRB 1329, 1330 (1992). The Board very recently noted that "unionized employers must refrain from making a unilateral change in employment terms, unless the union first receives notice and an opportunity to bargain over the change." *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 1 (2017) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). This notice must be "clear and unequivocal." *United Kiser Services*, 355 NLRB 319, 320 (2010). A union that does not learn of a change until after its implementation is not required to request bargaining. *See, Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999) (citing *United Hospital Medical Center*, 317 NLRB 1279, 1283 (1995), and *Walker Construction Co.*, 297 NLRB 746, 746 fn. 1 (1990)).

On or about November 14, 2017, supervisors Hoerner and Dates told shipping and receiving employees McCarthy and Greiner that the shipping and receiving employees would be working mandatory overtime immediately, beginning the next day until further notice, until an

existing backlog of work was cleared.[65] (Tr. 651, 652. 654, 958). As a result, McCarthy and Greiner worked overtime every day for the next few weeks and Respondent has admitted as much in their Answer. (Tr. 654, 981; GC Ex. 1[aa]). During that period, McCarthy and Greiner worked substantially more overtime than usual. (Tr. 652, 654-55). Previously overtime was voluntary. (Tr. 645-48, 959, 961, 979 1486).

In this case, Respondent never informed the Union of its decision to mandate overtime for the shipping and receiving employees. (Tr. 72). In fact, the first time the Union learned of the mandatory overtime was when an employee told Rosaci after he had already begun to work the overtime. (Tr. 73, 145-46). Thus, there was no notice or an opportunity to bargain this change prior to implementation and Respondent's conduct violated Section 8(a)(5) of the Act.

I. Respondent unlawfully laid off bargaining unit employees

Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally laid off ten bargaining unit employees. The Board is loath to allow a party to implement changes to employees' terms and conditions of employment in the midst of collective-bargaining negotiations. Where "parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995) (citing *Bottom Line Enterprises*, 302 NLRB 373 (1991)); *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 203-05 (2011) (Board reversed ALJ to find that the layoff of nine employees

[65] The employees were required to work overtime from Monday through Friday. (Tr. 982). Saturday overtime remained voluntary. (Tr. 982).

was unlawful because the employer was obligated to bargain to a complete agreement or overall impasse before implementing layoffs when negotiations were underway). The Board recognizes "two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining and when 'economic exigencies compel prompt action.'" *RBE Electronics*, at 81 (quoting *Bottom Line Enterprises*, 302 NLRB at 374).

A party claiming the economic exigency exception carries a "heavy burden" and must establish "extraordinary events that are 'an unforeseen occurrence, having [a] major economic effect [requiring] the company to take immediate action." *Id.* at 81; *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995) (quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-53 (1987)). As such, "the Board has held that economic events such as loss of significant financial accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *RBE Electronics of S.D., Inc.*, 320 NLRB at 81 (citations omitted).

Employee layoffs motivated by a lack of available work are mandatory subjects of bargaining. *Winchell Co.*, 315 NLRB 526, fn. 2 (1994); *Westinghouse Electric Corp.*, 313 NLRB 452, 453 (1993). Here, Respondent claims that the layoffs were due to a lull in available production work. (Tr. 1200-03). The parties were in contract negotiations at the time of the layoffs, and Respondent and the Union never reached an overall contract or even an agreement regarding the decision or the effects of the layoffs. (Tr. 107-08, 112, 892, 964, 1232-33). Therefore, absent an exception, Respondent's implementation of the layoffs violated Section 8(a)(1) and (5) of the Act.

Respondent failed to meet the "heavy burden," as established in *Bottom Line* and *RBE Electronics*, to justify laying off ten unit employees in the midst of contract negotiations. The record establishes that Respondent operates in a "cyclical" market which often fluctuates. (Tr.

1096). However, the record also reflects that due to the lengthy period of time between closing a sale and the completion of a project, Respondent often knows in advance when there will be a lull in production work. (Tr. 1093-1100). Further, it is common for Respondent's customers to request projects be completed before the end of a calendar year for tax purposes, creating a surge of production work the last few months of each year and a lull in production thereafter. (Tr. 1200-03). As such, in the Fall of 2017 when Respondent became aware of a coming lull in production work in January 2018, it was not a result of an "extraordinary event" or the "loss of significant financial account," and was not unforeseen. *Hankins Lumber Co.*, 316 NLRB at 838; *RBE Electronics of S.D.*, 320 NLRB at 81. Rather, it was an economic lull, resulting from the cyclical nature of Respondent's business, which quickly ended as a result of an uptick in customer orders that arrived beginning in January 2018 (even before the layoffs took place). (Tr. 105, 1199, 1205, 1208). In fact, Respondent referred to the period as a "slowdown" in communications with the Union. (R. Ex. 16). The circumstances described by Respondent do not come close to meeting the heavy burden to justify unilaterally laying off unit employees.

Furthermore, the lesser exigency exception contemplated by the Board, in *RBE Electronics*, is not applicable. In *RBE Electronics*, the Board stated:

> there are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exception…When these circumstances occur, we believe that the general *Bottom Line* rule foreclosing changes absent overall impasse in bargaining for an agreement as a whole should not apply. Instead, we will apply the traditional principles governing bargaining over changes in terms and conditions of employment referred to in *Bottom Line*. Thus, where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception…that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change.

320 NLRB at 81-82. For this lesser exigency exception to apply, where bargaining is not excused, the employer must establish that "time is of the essence and which demand prompt action," that the "exigency was caused by external events, was beyond its control or was not reasonably foreseeable." *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962 (2001) (citations omitted).

In *Pleasantiview Nursing Home*, the Board found that an employer's decision to unilaterally raise wage rates during in the midst of successor contract negotiations did not meet the lesser exigency exception. *Id.* While the employer did establish the need to increase its starting wage rate to attract and retain employees, the employer failed to show that 'time was of the essence' with respect to its employment situation, and that 'prompt action' was 'compelled' independent of the overall bargaining process. *Id.* (quoting *RBE Electronics of S.D., Inc.*, 320 NLRB at 81). In *Naperville Ready Mix, Inc.*, 329 NLRB 174, 182 (1999), the Board rejected an employer's defense that it was privileged to sell off all of its trucks (and therefore get out of the

trucking business) in the midst of successor contract negotiations absent an overall impasse. Specifically, the Board noted that while the employer did establish that the sale of the trucks by a date certain could save additional money, the employer "has not demonstrated that the problem [requiring that trucks be sold off] was beyond Respondent's control or was either unforeseen or not reasonably foreseeable." *Id.* Similarly, in *Maple Grove Health Care Center*, the Board rejected an employer's argument that it was privileged to implement an increase in health care premiums in the midst of first contract negotiations absent an overall impasse, as "it was highly unlikely…that the Respondent would have been placed in straitened financial circumstances had it paid the entire premium increase until overall impasse had been reached." 330 NLRB 775, 779 (2000).

Notably, the Board has held that a large year-to-year decrease in sales revenue does not justify unilateral action, as it is not properly considered "unforeseen." *Toma Metals, Inc.* 342 NLRB 787, 801 (2004) (the employer's "chronic economic condition did not constitute an extraordinary or compelling circumstance").

As previously noted, Respondent's business is cyclical and dependent on the existing marketplace. (Tr. 1096). As such, it is common for Respondent to go through production need increases (particularly at the end of a calendar year) and decreases (particularly at the start of a new calendar year) throughout the year. (Tr. 1093-1100, 1200-03). Therefore, in fall 2017, when Respondent became aware of a pending "slowdown" in production work starting in early 2018, it was "reasonably foreseeable." (Tr. 1199-1203; R. Ex. 16). *See*, *Pleasantview Nursing Home*, 335 NLRB at 962.

The Board's lesser exigency standard does not allow an employer to use the normal ebb and flow of a sales and production cycle to alleviate the need to bargain to overall impasse with a

union over a mandatory subject of bargaining in the midst of contact negotiations. *See*, *Naperville Ready Mix,* 329 NLRB at 183 ("the fact that NRM could save some money if the scheme were implemented before July 1…is an argument it might make in support of its proposal, but it in no way meets the economic exigency standard permitting changes in terms and conditions of employment in advance of an impasse in contractual negotiations"); and *U.S. Testing Co.*, 324 NLRB 854, 854 (1997) (increase in healthcare premiums insufficient to meet *RBE Electronics* standard). This is precisely what Respondent did in this instance – Respondent used a regular production "slowdown" as an excuse to unilaterally lay off ten unit workers for approximately ten weeks. (Tr. 355; R. Ex. 16).

As such, whether the fact finder applies either the greater or lesser exigency standard contained in *Bottom Line* or *RBE Electronics*, the outcome is the same. Respondent was not permitted to unilaterally lay off ten unit employees, and in doing so, violated Section 8(a)(1) and (5) of the Act.

J. Respondent unlawfully changed Hudson's work assignment and denied him overtime because of his union activity

Respondent's decisions to change Hudson's work assignment and refuse to offer him overtime must be analyzed under *Wright Line*. It is well-established that transferring an employee to a less desirable position is an adverse action which, if done in retaliation for an employee's union activity, violates Section 8(a)(3). *See, e.g.*, *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 958 fn. 3 (2004). Similarly, it is well-established that denying an employee overtime is an adverse action upon which an 8(a)(3) violation may be grounded. *Langston Companies, Inc.*, 304 NLRB 1022, 1022 (1991).

Respondent's actions are based on Hudson's union activities. First, there are statements of animus about the protected activities the employee engaged in. S*ee, e.g.*, *Austal USA, LLC*, 356 NLRB 363, 363 (2010). Second, Respondent's asserted reasons for the employee's work assignment demotion and refusal for overtime are pre-textual. *See, e.g.*, *Lucky Cab Company*, 360 NLRB at 271; *ManorCare Health Services – Easton*, 356 NLRB at 204; *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)); *Cincinnati Truck Center*, 315 NLRB 554, 556-57 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997). Respondent would have to meet an insurmountable *Wright Line* burden for there to be no violation in this case.

1. Hudson is a staunch union supporter

As an initial matter, Hudson was and remains the most vocal union supporter. Hudson was the initial and primary employee contact for the Union during the organizing drive. (Tr. 31, 173, 887). Hudson, nicknamed by his coworkers "the President" due to his pro-union activities, often spoke with co-workers about attending union meetings, asked his co-workers to sign union cards, and often wore pro-union clothing. (Tr. 174, 528, 669). During the Union's campaign, Respondent held multiple employee meetings to discourage unionization. (Tr. 179-80). Respondent bolded the names of Hudson and other "union initiators" on Respondent-maintained lists of employees required to attend each meeting. (Tr. 180-81). Hudson served as the Union's witness during the Board-run representation election, and later served on the Union's bargaining committee. (Tr. 174, 887, 890). Hudson was and remains open about his support for the Union – he visibly wears pro-union T-shirts and buttons on a daily basis, and answers union-related

questions from his co-workers. (Tr. 888-89, 913).[66] Respondent does not dispute that Hudson is a vocal union supporter. (Tr. 1274). The types of union activities that Hudson engaged in as described above are the exact same type that Respondent has evinced animus against (i.e., wearing union T-shirts, lunchtime rallies, etc.). *See*, Supra Part IV.B. Respondent unlawfully punished Hudson for engaging in these activities as an attempt to quell his union support.

2. Hudson's transfer to the saw was a less desirable assignment

Hudson also has a well-established reputation as the best welder in the plant. (Tr. 201, 242, 356, 674-75, 808).[67] Hudson is known around the Plant as "Goldenrod" due to his superior welding skill. (Tr. 675, 808). Both management and production employees consider welding to be one of the highest-skilled jobs at the plant. (Tr. 204, 530). By contrast, both management and production employees consider saw operation to be one of the lowest skilled jobs on the plant floor. (Tr. 203, 229, 529, 677, 925). Generally, to complete their work, saw operators simply need to read a tape measure and operate the saw. (Tr. 1414-15). As such, the record reflects that only minimal training is needed to operate the saws. (Tr. 1414-15).

Hudson was among the employees laid off in February 2018. (Tr. 891; R. Ex. 6). Respondent, in the layoff ranking chart, gave Hudson the third-lowest score among all production employees. (R. Ex. 6). Hudson received scores above zero in two categories, "Weld A" and "P&G." (R. Ex. 6). Hudson received a zero rating in 14 categories including "Saw." (Tr. 923; R. Ex. 6). When Hudson reported for work after the layoff he asked Garcia about his work assignment. (Tr. 893). Garcia told him that he would be working with Norway in Bay 1. (Tr.

[66] Hudson was one of the employees identified by picture in the Union's January 24, 2018 certified letter. (Tr. 30, 1537; GC Ex. 3). Respondent acknowledges receipt of the letter. (Tr. 1593).

[67] Howe testified that Hudson is one of the "more talented welders" in the plant. (Tr. 1237).

893). Hudson spoke with Norway, and learned he was assigned to operate the band saw. (Tr. 894). Hudson immediately recognized this assignment as a punishment. Hudson replied that it was ironic that he received a zero rating on the saw and yet was being assigned to work the band saw. (Tr. 894). Norway replied "we all know you can work the saw." (Tr. 894). This statement supports the conclusion that this assignment was merely pre-textual; Respondent was looking to punish Hudson for his union activity.

Respondent claims that Hudson was assigned to the saw to increase his versatility, though Norway told Bush that Hudson was assigned to the saw because the temporary workers could not operate it. (Tr. 843-44, 1408). These shifting justifications further demonstrate the pre-textual nature of the temporary demotion. Even if Respondent was attempting to increase his versatility, Hudson was the only employee to which Respondent gave this "courtesy." The record specifically reflects that when the other laid-off employees returned in February, nearly all of the welder/fitters returned to their regular welding and fitting work. (Tr. 355-56, 677-78, 810-11).[68] Further, most of the production workers that were moved to different jobs previously requested job transfers and all remained in their general areas of expertise. (Tr. 1408, 1409-1410).[69] Hudson never requested to work the saw. Furthermore, there is no record evidence to indicate that Respondent assigned Hudson to work in any of the other 14 categories where he received a zero rating, some of which certainly would not be considered a demotion.

[68] Record testimony further reflects that Respondent assigned welding work to several temporary workers (Gino, Wade and Ken) during the period that Hudson was assigned to work the saw. (Tr. 811-812, 900-901). During that same period, Respondent assigned welding work to some employees that did not traditionally perform that work. (Tr. 908).

[69] For instance, Dmytro Rulov went from fitting one type of assembly to another type of assembly, Bush went from welding conveyers to a fitter/welder, Mario Rojas went from welding smaller items to welding larger items, and Zack Krajewski, who was only welding, was allowed to both paint and weld. (Tr. 1407, 1432).

3. Respondent unlawfully refused Hudson overtime

Respondent's decision to refuse Hudson overtime was unlawfully rooted in his union activity. The record also establishes that there was a substantial amount of welding work available when the laid employees returned to work. (Tr. 677-78, 809, 810). When Krajewski returned from layoff, he continued to perform welding work. (Tr. 1433). When Rojas returned from layoff, he performed welding work. (Tr. 1433). Upon his return from layoff Hudson quickly noticed the large amount of work available and asked if he was allowed to work overtime (either welding or on the saw). (Tr. 896-97).[70] Respondent told Hudson that he was not approved for any overtime. (Tr. 897). Over the next two weeks, Hudson asked to work overtime on three or four additional occasions, and was denied each time. (Tr. 898). Respondent's time records indicate that Hudson did not work overtime until April 26, and only worked two hours of overtime during all of April 2018. (GC Ex. 64). The facts establish that the Employer had overtime work available in the machine operating area, as Thompson was granted the unfettered right to work overtime while also working on the saw. (Tr. 897). When juxtaposing Hudson's undeniable union activity with Respondent's untenable justifications for his work assignment and denial of overtime, the only logical conclusion is that Respondent violated the Act.

K. Respondent's unlawful acts warrant a *Mar-Jac Poultry* Remedy

As part of the appropriate remedy for the violations argued above, the General Counsel seeks an Order requiring Respondent bargain in good faith with the Union, upon request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), enfd. 328 F.2d 600 (5th Cir. 1964). Ordinarily, a Union enjoys unquestionable majority status for one year following Board certification so that the newly-certified union can bargain meaningfully on behalf of its members

[70] During periods Respondent offers overtime, Hudson usually works between 6-10 hours of overtime per week. (Tr. 888).

during the time when it is generally at its greatest strength. *Mercy, Inc.*, 346 NLRB 1004, 1005 (2006); *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992); *Accurate Auditors*, 295 NLRB 1163, 1166 (1989). Under *Mar-Jac Poultry* and its progeny, this period of irrefutable majority status may be extended where an employer's unlawful acts rob the union of the benefits of the certification year. *See, e.g.*, *Latino Express, Inc.*, 360 NLRB 911, 926 fn. 21 (2014); *Outboard Marine Corp.*, 307 NLRB at 1348. When applying this standard remedy, the Board examines, "the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations." *Mercy, Inc.*, 346 NLRB at 1005.

An extension of the certification year is essential to remedy Respondent's violations in this case. Here, Respondent's serious and multitudinous unfair labor practices during the initial certification year made meaningful bargaining impossible. While Respondent has attended approximately 25 timely bargaining sessions they have been unproductive, in large part due to the many 8(a)(5) violations that rest on Respondent failing its bargaining obligations. Not even three months after certification Respondent unilaterally removed employees from the bargaining unit. It changed employee pay without bargaining. It unilaterally changed its light duty policy. It required employees to work mandatory overtime without bargaining with the union. Respondent even laid off ten employees without bargaining to impasse. Even after being reminded of their obligation and notified of the union's desire to do so, Respondent failed to bargain with the Union prior to issuing discretionary discipline.

Perhaps the best example of Respondent's misconduct during bargaining that justifies the *Mar-Jac* remedy is the "negotiations" about providing its bargaining unit employees their annual reviews and wage increases. Respondent began by failing to provide unit employees their

promised annual reviews in Fall 2017, like they did for their non-unit employees and had done previously. After a charge was filed and the Region decided to move forward, Respondent provided a review, without the typical wage increase, on April 8, 2018; nearly 7 months late. Respondent then decided to "bargain" with the Union regarding the required wage increase.

Furthermore, Respondent made its animus to the union well known. In demonstrating its animus, Respondent made nearly every variety of unlawful statement possible, and failed to provide evidence to refute a single allegation. These violations include unlawful threats, interrogations, instructions, impressions of surveillance, refusal to provide union representation, and implied promises. Respondent also suspended an employee, changed employee work assignments, and refused overtime because of employee union support. Naturally, Respondent's conduct had a negative impact on bargaining.

From the outset, Respondent's conduct in and out of the negotiation sessions has prevented meaningful bargaining. For the foregoing reasons the General Counsel requests an extension of the certification year to allow for good-faith bargaining for a reasonable period of time.

V. CONCLUSION

The General Counsel has met its burden of proving that Respondent engaged in behavior that violates Sections 8(a)(1), (3), and (5) of the Act. The record establishes that Respondent made numerous threats and statements to multiple employees that violate Section 8(a)(1). This included denying employee John Fricano his request for union representation during an investigatory interview and a threat in another employee's appraisal. Respondent also suspended employee Dennis Bush in violation of Section 8(a)(3). In using its discretion to discipline Fricano and Bush without bargaining with the Union, Respondent violated Section 8(a)(5).

The evidence unequivocally establishes that Respondent failed to provide annual performance reviews and wage increases to its bargaining unit employees because of their protected right to elect union representation. Similarly, the evidence shows that Respondent changed staunch union supporter and bargaining unit employee William Hudson's work assignment and refused to offer him overtime because of his union support.

The record evidence demonstrates that Respondent either removed bargaining unit employees Garcia, Norway, and Fess from the unit by promoting them without bargaining with the union and still required them to perform bargaining unit work, or that those employees remained part of the bargaining unit and received a raise and were subjected to a different light duty policy than the rest of the bargaining unit employees. Either way, Respondent violated Section 8(a)(5) in its treatment of Garcia, Norway, and Fess. Respondent also violated Section 8(a)(5) when it laid off ten bargaining unit employees, required others to work mandatory overtime, and failed to provide the union with requested relevant information.

For the reasons set forth above, it is submitted that Respondent has violated the Act in the manner alleged in the Complaint, and that the relief requested in the Proposed Order should be granted.

Dated January 28, 2019
At Buffalo, New York

Respectfully submitted,

/s/ Jessica L. Noto

JESSICA NOTO
Counsel for the General Counsel
National Labor Relations Board, Region Three
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202

PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union in a labor organization within the meaning of Section 2(5) of the Act.

3. Ken Scheidel, Richard Howe, Daniel Voigt, Michael Dates, Michael Hoerner, Janet Semsel, Joseph Bertozzi and Thomas Wendt, Jr. are supervisors and agents of Respondent within the meanings of Section 2(11) and 2(13) of the Act, respectively.

4. Denise Williams and Respondent's unnamed legal representative are agents of Respondent within the meaning of Section 2(13) of the Act.

5. By interrogating an employee about his support for the union by asking if the employee would change his vote if a new election were held, Respondent violated Section 8(a)(1) of the Act.

6. By informing an employee that pro-union employees were targeted for a future layoff, Respondent violated Section 8(a)(1) of the Act.

7. By impliedly instructing an employee to remove a T-shirt which displayed union insignia, Respondent violated Section 8(a)(1) of the Act.

8. By informing an employee that Respondent saw a pro-union photograph on the employee's Facebook page, Respondent created the impression of surveillance and violated Section 8(a)(1) of the Act.

9. By instructing an employee to remove a pro-union photograph from the employee's Facebook page, Respondent violated Section 8(a)(1) of the Act.

10. By interrogating an employee about his union activities and sympathies by asking about his conversations with other union members, Respondent violated Section 8(a)(1) of the Act.

11. By informing an employee that Respondent could observe all of the employee's Facebook activities regardless of whether the employee blocked or limited access to their Facebook page, Respondent created the impression of surveillance and violated Section 8(a)(1) of the Act.

12. By threatening an employee with unspecified reprisals for wearing a T-shirt which contained a pro-union message and logo, Respondent violated Section 8(a)(1) of the Act.

13. By informing an employee that Respondent had cameras covering the exterior of its facility and that those cameras could see any activity that occurs outside the facility, Respondent created the impression of surveillance and violated Section 8(a)(1) of the Act.

14. By implying that an employee would receive a wage increase if the employee ceased support for the union, Respondent violated Section 8(a)(1) of the Act.

15. By informing an employee that employees who supported the union would be selected for layoff, Respondent violated Section 8(a)(1) of the Act.

16. By threatening an employee with unspecified reprisals by implying that an employee should not support the union because the employee had a family to support, Respondent violated Section 8(a)(1) of the Act.

17. By threatening an employee with unspecified reprisals for supporting the union, Respondent violated Section 8(a)(1) of the Act.

18. By implying in a written performance review that an employee should focus on work rather than union activity, Respondent violated Section 8(a)(1) of the Act.

19. By denying the request of its employee John Fricano to be represented during an interview which Fricano reasonably believed would result in discipline, and then continuing with that interview, Respondent violated Section 8(a)(1) of the Act.

20. By suspending John Fricano, without bargaining with the Union over imposing discretionary discipline, Respondent violated Section 8(a)(1) and (5) of the Act.

21. By suspending Dennis Bush, due to this union activity and without bargaining with the Union over imposing discretionary discipline, Respondent violated Section 8(a)(1), (3) and (5) of the Act.

22. By failing to provide annual performance reviews and accompanying wage increase from October 2017 through about April 2018, due to employees' union activity and without bargaining with the Union to an overall good-faith impasse, Respondent violated Section 8(a)(1), (3) and (5) of the Act.

23. By changing William Hudson's work assignment due to his union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

24. By refusing to offer overtime to William Hudson due to his union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

25. By unilaterally removing employees from the bargaining unit without the Union's consent, Respondent violated Section 8(a)(1) and (5) of the Act.

26. By unilaterally removing bargaining unit work from the bargaining unit and transferring it to non-bargaining unit employees without bargaining with the Union to an overall good-faith impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

27. By unilaterally granting wage increases to certain bargaining unit employees without bargaining with the Union to an overall good-faith impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

28. By unilaterally requiring its shipping and receiving employees to work mandatory overtime without bargaining with the Union to an overall good-faith impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

29. By unilaterally changing its policy concerning light duty work assignments, without bargaining with the Union to an overall good-faith impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

30. By laying off ten bargaining unit employees without bargaining to an overall good-faith impasse with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

31. By failing and refusing to furnish the Union with certain requested information, Respondent violated Section 8(a)(1) and (5) of the Act.

32. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

PROPOSED ORDER

The Respondent, Wendt Corporation, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Failing and refusing to recognize and bargain with the Shopmen's Local Union No. 576 ("Union") as the exclusive collective-bargaining representative of its employees in the appropriate unit set for the below:

> All full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen and shipping and receiving clerks employed by the Respondent at its facility located at 2555 Walden Avenue, Buffalo, New York 14225, but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) Interrogating employees about their union activities and sympathies;

(c) Instructing employees to remove union paraphernalia;

(d) Creating the impression of surveillance amongst our employees;

(e) Threatening employees with for wearing union paraphernalia;

(f) Telling employees that union supporters are targeted for future layoffs;

(g) Informing employees that we have seen pro-union postings or photographs on their Facebook pages;

(h) Instructing employees to remove pro-union postings or photographs from their Facebook pages;

(i) Informing employees that we can observe all of their Facebook activities regardless of whether employees limit or block our access to their Facebook page;

(j) Implying to employees that our exterior cameras can see any activity, including union activity, which occurs outside our facility;

(k) Telling or otherwise implying to our employees that they will receive a wage increase if they do not support the union.

(l) Telling or otherwise implying to our employees that they should not support the union because they have a family to support;

(m) Threaten employees with retaliation for supporting the union;

(n) Implying in performance reviews that employees should focus on work rather than union activity;

(o) Denying employee requests for union representation during interviews which the employee reasonably believes could result in disciplinary action;

(p) Suspending employees in retaliation for their pro-union activities;

(q) Changing employee work assignments in retaliation for their pro-union activities;

(r) Refusing to offer employees overtime in retaliation for their pro-union activities;

(s) Refusing to bargain with the Union over discretionary disciplines issued to employees before reaching a collective-bargaining agreement with the Union;

(t) Refusing to provide performance reviews and wage increases to employees in retaliation for their pro-union activities;

(u) Changing to the timing of performance reviews and wage increases without bargaining with the Union to an overall good-faith impasse;

(v) Removing employees from the bargaining unit without the consent of the Union;

(w) Transferring bargaining unit work to non-bargaining unit employees without bargaining with the Union to an overall good-faith impasse;

(x) Requiring employees to work overtime without bargaining with the Union to an overall good-faith impasse;

(y) Instituting a light duty work policy without bargaining with the Union to an overall good-faith impasse;

(z) Laying off our employees without bargaining with the Union to an overall good-faith impasse;

(aa) Refusing to provide the Union with requested, relevant information;

(bb) In any like or related manner interfere with, restrain, or coerce employees in violation of the rights guaranteed to you by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit described above;

(b) Remove the language in Dmytro Rulov's 2018 evaluation implying that he should focus on work rather than union activity;

(c) Rescind the October 26, 2017 suspension issued to John Fricano, notify him in writing that this has been done and that it will not be relied on for any future purpose.

(d) Rescind the December 27, 2017 suspension issued to Dennis Bush, notify him in writing that this has been done and that it will not be relied on for any future purpose.

(e) Make John Fricano and Dennis Bush whole, with interest, for any loss of earnings and benefits suffered by them as a result of their unlawful suspensions.

(f) Make whole, with interest, all bargaining unit employees for any loss of earnings and benefits they may have suffered as a result of our refusal to grant wage increases.

(g) Make William Hudson whole, with interest, for any loss of earnings and benefits that may have been suffered by him as a result of denying him overtime work and changing his work assignment.

(h) At the request of the Union, restore Americo Garcia Jr., Daniel Norway, and Donald Fess to the bargaining unit and make them whole, with interest, for any loss earnings they may have suffered as a result of their removal from the bargaining unit.

(i) At the request of the Union, rescind the wage increases granted to Americo Garcia Jr., Daniel Norway, and Donald Fess as a result of their remove them from the bargaining unit.

(j) At the request of the Union bargain with the Union as the exclusive collective bargaining representative of the employees in the following appropriate unit on terms and conditions of employment for the period of one year required by *Mar-Jac Poultry*, 136 NLRB 785 (1962), and if an understanding is reached, embody the understanding in a signed agreement.

(k) Make the bargaining unit employees laid off on or about February 9, 2018 whole, with interest, for any loss of earnings and benefits they may have suffered as a result of their unlawful layoff.

(l) Provide the Union with the date(s) of wage increases of our non-unit and office employees as requested by the Union orally on May 24, 2018 and in writing on May 29, 2018.

(m) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records and reports, and all such other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(n) Within 14 days after service by the Region, post at Respondent's Cheektowaga Plant copies of the attached notice to employees. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at the Cheektowaga Plant since September 1, 2017.

(o) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

PROPOSED NOTICE

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything which interferes with, restrains or coerces you with respect to these rights. More specifically,

WE WILL NOT fail and refuse to bargain with the Shopmen's Local Union No. 576 ("Union") as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

> All full-time and regular part-time janitors, welders, machine operators, maintenance mechanics, fitters, assemblers, painters, machinists, leadmen and shipping and receiving clerks employed by the Respondent at its facility located at 2555 Walden Avenue, Buffalo, New York 14225, but excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT interrogate you about your support for the Union.

WE WILL NOT tell you that pro-union employees are targeted for layoffs.

WE WILL NOT instruct you to remove pro-union paraphernalia.

WE WILL NOT threaten you with unspecified reprisals for wearing pro-union paraphernalia.

WE WILL NOT tell you that we are monitoring your Facebook activity or that we can observe your Facebook activity even if you block us from viewing it.

WE WILL NOT instruct you to remove pro-union postings from your Facebook page.

WE WILL NOT ask you about your protected conversations with other union members.

WE WILL NOT tell you we have cameras that can see your activities outside our facility.

WE WILL NOT tell you that you will receive a wage increase if you do not support the Union.

WE WILL NOT imply that you should not support the Union because you have a family to support.

WE WILL NOT threaten you with unspecified reprisals for supporting the Union.

WE WILL NOT direct you to focus on work rather than union activity in written performance reviews.

WE WILL NOT deny your requests for representation during an investigatory interview that you reasonably believe will result in discipline.

WE WILL NOT suspend or otherwise discipline you in retaliation for your pro-union activities.

WE WILL NOT discharge, suspend or demote you without providing the Union notice and an opportunity to bargain about the discipline.

WE WILL NOT fail to provide you with annual performance reviews and accompanying wage increases in retaliation for your pro-union activities or without first bargaining with the Union.

WE WILL NOT change your work assignment in retaliation for your pro-union activities.

WE WILL NOT refuse to offer you overtime in retaliation for your pro-union activities.

WE WILL NOT remove bargaining unit employees from the bargaining unit without first bargaining to agreement with the Union.

WE WILL NOT remove assign bargaining unit work to non-bargaining unit employees without first bargaining with the Union.

WE WILL NOT grant wage increases without first bargaining with the Union.

WE WILL NOT require you to work overtime without first bargaining with the Union.

WE WILL NOT change our light duty work policy without first bargaining with the Union.

WE WILL NOT lay you off without first bargaining to with the Union.

WE WILL NOT refuse to provide the Union with requested, relevant information.

WE WILL NOT in any similar manner interfere with your rights under Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively and in good faith with the Union as the exclusive representative of our employees in the appropriate unit set forth above concerning terms and conditions of employment.

WE WILL recognize and, upon request, bargain in good faith with the Union as your representative concerning wages, hours and working conditions, based on the extension of the initial certification year for a period of a year from the commencement of good-faith bargaining and, if an agreement is reached with the Union, we will embody the agreement in a signed document.

WE WILL remove the language in Dmytro Rulov's 2018 performance evaluation implying that he should focus on work rather than union activity.

WE WILL rescind the December 27, 2017 suspension issued to Dennis Bush, notify him in writing that we have done so and that we will not rely on it for any future purpose.

WE WILL rescind the October 26, 2017 suspension issued to John Fricano, notify him in writing that we have done so and that we will not rely on it for any future purpose.

WE WILL make Dennis Bush and John Fricano whole, with interest, for any loss of earnings and benefits suffered by them as a result of their unlawful suspensions.

WE WILL make whole, with interest, all bargaining unit employees for any loss of earnings and benefits they may have suffered as a result of our refusal to grant wage increases.

WE WILL make William Hudson whole, with interest, for any loss of earnings and benefits suffered by him as a result of our refusal to offer him overtime work and our decision to change his work assignment.

WE WILL, at the request of the Union, restore Americo Garcia Jr., Daniel Norway, and Donald Fess to the bargaining unit and make them whole, with interest, for any loss earnings they may have suffered as a result our decision to remove them from the bargaining unit.

WE WILL, at the request of the Union, rescind the wage increases granted to Americo Garcia Jr., Daniel Norway, and Donald Fess as a result of our decision to remove them from the bargaining unit.

WE WILL make the bargaining unit employees laid off on or about February 9, 2018 whole, with interest, for any loss of earnings and benefits they may have suffered as a result of their unlawful layoff.

WE WILL provide the Union with the date(s) of wage increases of our non-unit and office employees as requested by the Union orally on May 24, 2018 and in writing on May 29, 2018.

WENDT CORPORATION

(Employer)

DATED: _____ BY: _____

(Representative) (Title)

National Labor Relations Board, Niagara Center Building, Suite 630, 130 S. Elmwood Avenue,
Buffalo, NY 14202 - Telephone: 716/551-4931